Insurance Counsel Journal

October, 1944

VOL. XI NO. 4

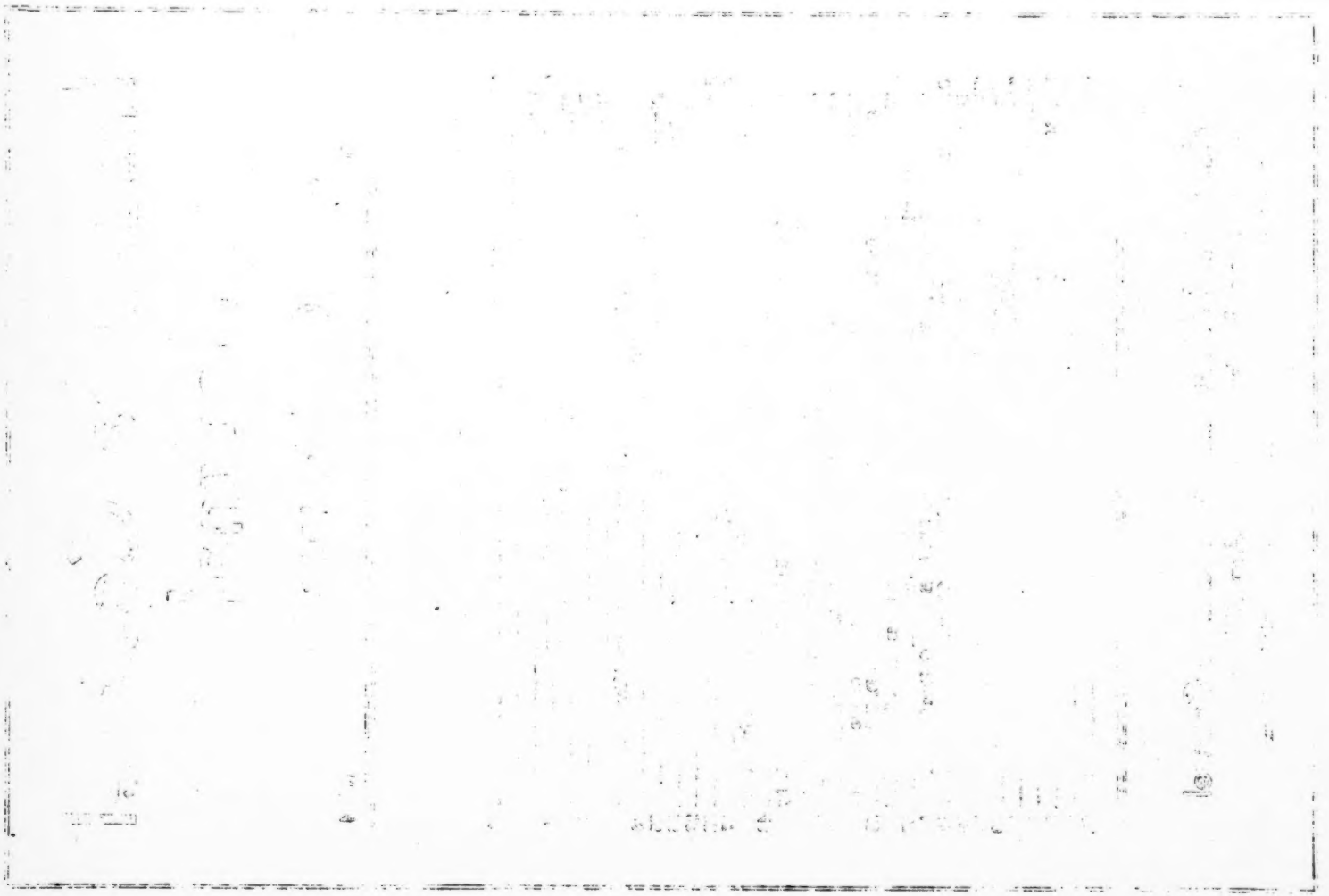
CONVENTION ISSUE

Issued Quarterly by

International Association of Insurance Counsel

Massey Building :: Birmingham, Alabama

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama



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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

F. B. BAYLOR

President, International Association of Insurance Counsel

1944-1945

President's Page

THE annual meeting of the International Association of Insurance Counsel held on September 11, 1929, was attended by forty-nine lawyers. At that meeting the secretary reported the total membership to be four hundred twenty-seven. In 1944 the attendance was more than six times, and the membership is more than three times that of 1929. The progress which those figures inadequately demonstrate really justifies the concerted effort which has produced it. We all salute those who envisioned and built an organization which stands high in achievement, influence and accomplishment.

Most assuredly it is a honor to serve our Association and I acknowledge with pleasure and gratitude the distinction which comes to me from being one of its officers. No one would fail to be inspired both by the unity of purpose which the members display and by the many generous offers of assistance which they have made. Without doubt this is to be another year of progress for which every member will be responsible. From time to time you will receive through the *Journal* a report of what is being done, but if that report is to be satisfactory you must give us the benefit of your own suggestions. These will assure the progress for which we all are striving.

Pat Eager and the other officers and members who arranged the 1944 meeting, program and entertainment accomplished wonders under adverse conditions. No one fails to recognize the debt due to those who so ably and effectively took part.

The place of the next meeting depends a great deal upon developments in transportation, but if the enthusiasm of last month can be duplicated every one will be happy. In these times when the term "capital gains" figures prominently in our calculations you should not forget that you can realize on some untaxable ones by attending the next annual meeting. We certainly expect it to reflect that delightful mixture of good fellowship and erudition which has characterized those of the past.

The Executive Committee has directed that no state legislative committees be appointed this year, but that the general chairman call on any member for assistance in the shaping of legislation. It is probable that many of you will hear from him while your assemblies are in session. State membership committees will be appointed. They should assume the responsibility not only of determining the qualifications of those proposed for membership, but of obtaining the applications of outstanding insurance lawyers who now are not identified with the Association.

We have come a long way in fifteen years, but this is only the first of the next fifteen.

F. B. BAYLOR
President.

Lincoln, Nebraska

Insurance Counsel Journal

PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
BIRMINGHAM, ALABAMA.

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

Subscription price to members $2.00 a year. To individuals not members $4.00 a year. Single copy $1.00.

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama

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PRESIDENT BILL BAYLOR

READERS of the *Journal* who have been fortunate enough or smart enough to attend our annual meetings, particularly our last meeting at the Edgewater Beach Hotel in Chicago, will need no introduction to our new president, Bill Baylor. Bill Baylor has been active in the work of this Association for many years. He has contributed many articles of interest to the *Journal* and his reports made at our annual meetings and published in our *Journal* as chairman of various committees demonstrate that Bill is not only an able lawyer, but is a tireless worker. He will need the cooperation of the membership to carry on the work which has been thrust upon him as president of The International Association of Insurance Counsel. I am sure that he will be able to count on each of you to cooperate in the handling of the work of the Association and to perform such duties and tasks as he may call on you to perform from time to time.

Your president has already given consideration to the holding of our next annual meeting and the time and place for the meeting. It now appears that we may have difficulty in securing a suitable time for a meeting at Hot Springs, Virginia. I am sure some of you would like to go back to White Sulphur, particularly if transportation facilities by the time of our next meeting have sufficiently improved. I am sure your president will appreciate your writing him and giving him the benefit of your views as to the time and place for our next annual meeting.

President Baylor has advised me that at an early date he will appoint standing committees and advise all members of their respective appointments. A list of the various committees will appear in the January, 1945 issue of the *Journal*.

* * *

REPORTS AND ADDRESSES DELIVERED AT ANNUAL MEETING NOT APPEARING IN CURRENT ISSUE OF JOURNAL

I deeply regret that due to limited space in the *Journal* I am unable to include in the October issue all reports and addresses delivered at our annual meeting. These reports and addresses will appear in our January issue. As the addresses and reports are most interesting, I am sure you will look forward to reading them in the January *Journal*. For your information the following are the reports and addresses which will appear in the January issue:

"Liquidated Damages in Government Contracts—A Review", by Nelson R. Kerr, Attorney New Amsterdam Casualty Company, Baltimore, Maryland.

"Liability for Damages for Nuisance Resulting from Atmospheric Pollution", by Clarence B. Runkle, of Los Angeles, California.

"Regulation of Insurance—Some Recent Trends", by C. C. Fraizer, Director of Insurance of the State of Nebraska, of Lincoln, Nebraska.

Welcoming Address, by Honorable Paul F. Jones, Former Director of Insurance of the State of Illinois.

Response to Address of Welcome, by Will R. Manier, Jr., of Nashville, Tennessee.

Report of President Eager.

Report of Robert M. Noll, Treasurer.

Report of David I. McAlister, Secretary.

Report of George W. Yancey, Editor.

* * *

AMENDMENT TO BY-LAWS

I would like to call to the attention of all members the following amendment to the By-Laws offered by Mr. Robert P. Hobson at our last meeting:

"Where a member ceases to devote substantial portion of his work to the representation of insurance companies, or retires from the practice of law temporarily or permanently, the Executive Committee

may, upon his application, continue his membership in the Association or strike his name as a member, as the facts may justify."

To some of us who are growing older and to those of our members who have or may accept executive positions with insurance companies not connected with the legal problems of insurance companies, this amendment I am sure will be considered with much satisfaction.

* * *

TO OUR MEMBERS WHO ARE IN THE ARMED FORCES OF THE UNITED STATES

It has been the purpose of your secretary and your editor and your officers to see to it that our members serving in the Armed Forces receive the *Journal*. We also have attempted to keep a correct list of our members in the Armed Forces and to publish same from time to time in order that members could write their friends stationed both in this country and overseas. I have received a V-Mail letter from one of our members from "Somewhere in Russia." I am publishing this letter herein as I am sure you will read it with much interest. I hope that those of you who know Major Dunn will write him. I am sure he will welcome a letter from you.

"Somewhere in Russia

Managing Editor,
International Ass'n of Insurance Counsel,
Massey Bldg.,
Birmingham, Ala.

Sir:

"I thought the Association might be interested to know it has a member in Russia. I am the inspector general of this command. I am going into my third year of service overseas.

"I get the *Journal* eventually. The July issue reached me today. Please note my change of address.

RALPH P. DUNN, *Major, I.G.D.*"
Headquarters Eastern Command,
U. S. Strategic Air Forces,
A.P.O. 798, c/o Postmaster,
New York, N. Y.

* * *

OPEN FORUMS AT ANNUAL MEETING

I am sure the readers of the *Journal* will find open forum discussions appearing in this issue of the *Journal* of interest and that these discussions, as well as prepared addresses delivered at our last meeting, will be preserved by the membership for future reference. These discussions were well attended by our members. Since our meeting I have had many letters from members and non-members making inquiry as to when they would receive the *Journal* containing these discussions, and making particular inquiry with reference to the open forum on Aviation Insurance. I have found that Aviation Insurance Law and the general subject of Aviation is being given more and more consideration by insurance executives, home office general counsel, and trial insurance attorneys throughout the country. We should all prepare to meet aviation as it will be shortly after the war is won.

* * *

INVITATION TO MEMBERS

As you probaby know, all articles appearing in the *Journal* are written by members or others who are willing to contribute of their time and talents without reward. It is, therefore, necessary for the members to give of their time and talents in order that the *Journal* be worth while and a success. This is an invitation to each member of our organizaiton to make suggestions as to how the *Journal* could be improved, to contribute articles, to propound questions through the pages of the *Journal*, and provoke discussions through the pages of the *Journal*.

OPEN FORUM

Aviation Insurance Law

Chairman: E. SMYTHE GAMBRELL, *Attorney, Atlanta, Ga.*

DISCUSSION LEADERS

REED M. CHAMBERS, *President*
United States Aviation Underwriters
New York, N. Y.

FRANKLIN J. MARRYOTT, *Counsel,*
Liberty Mutual Insurance Company,
Boston, Mass.

W. PERCY MCDONALD, *Attorney,*
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American Airlines, Inc.
New York, N. Y.

FORREST A. BETTS, *Attorney,*
Los Angeles, Calif.

GEORGE W. ORR,
Director of Claims, United States Aviation Underwriters,
New York 7, N. Y.

* * *

What Insurance Is Doing For Aviation

BY REED M. CHAMBERS, *President,*
United States Aviation Underwriters, Inc.
New York. New York

I WAS very pleased to receive the invitation from Smythe Gambrell to appear before this distinguished gathering. It was not until I started thinking about what I would say today that I realized that the subject, "What Insurance Is Doing for Aviation", is a difficult one to stick to literally. I can tell you what insurance has done for aviation, what it was doing day before yesterday, when I left New York, and what some of our plans are for the future.

The truth is that aviation insurance is probably the most dynamic form of insurance written. This is to be expected because, certainly, aviation is the most dynamic industry the world has ever seen, and insurance must take on the characteristics of that which it insures.

By way of introduction, I think that it might not be amiss to tell you how I happened to get into aviation insurance. I remained in aviation in one capacity or another after I resigned from the Army in 1920, and, like all of the old pioneers, have had more than my share of hamburgers. In 1925 I organized Florida Airways, which was one of the first attempts by anyone to provide scheduled air transportation in this country. The stockholders in this organization were all wealthy individuals who went in with their eyes open and the realization that commercial air transport was, to say the least, highly speculative. We purchased the first four Ford-Stout all metal aircraft sold by the Ford Motor Company.

Our first mishap occurred before the line got into operation when one plane taxied between two others, damaging the wing tips on the offending plane and one wing tip each on the other two. This was the first event that caused me to become insurance conscious because several of the wealthy subscribers refused to come through with the original stock subscriptions that they had made to Florida Airways, and I realized then that capital would never come into aviation until it could be assured of protection by insurance.

After the line had been in operation a few months, the hurricane that struck Miami in 1926 got one of our craft on the ground,

completely destroying it. In fact, parts of it are probably being used as alligator garages back in the Everglades to this day.

It must be realized that our weather reporting system at that time could not forecast hurricanes either as to time of arrival or intensity. In this instance, our Miami operations had been in constant touch with the Weather Bureau, but was assured that there was no danger of a storm of sufficient intensity to damage an airplane.

About this time I discussed with some of our major stockholders in New York the thought of attempting to obtain insurance against such losses. I found there was only one possible domestic source, and the individual at that time doing the underwriting, when approached on the subject of insuring our airline, stated that it would be necessary to send an inspector to make a complete examination of the line, and a charge of twenty-five dollars a day and all expenses would be made. After this inspection, they would take the matter under advisement as to whether insurance might be made available and at what rates. It just so happened that I knew the individual they were intending to send. He was not a flyer and had no practical knowledge of aviation, but was a theorist of the first water. He stated that it would probably require thirty days to make the necessary survey. This did not interest me. I then tried to find out what the European airlines were doing about insurance.

Shortly thereafter, Mr. Harvey Bowring of C. T. Bowring & Company, of London, came to New York, and the stockholders and I went over the entire proposition with him. Before long a two passenger airplane, which we owned, crashed, killing both passengers and the pilot. We were, as a result, faced with damage suits which would completely bankrupt the corporation. Thereupon, the stockholders decided to liquidate the company and reorganize it—which was later done, and it became a part of the great Pan American World Airways System, which was then in process of getting started.

Soon after this, my partner, Dave Beebe, who was at that time in the Marine Department of Marsh and McLennan, having learned of my experience plus the experiences of one or two other pioneer airlines, such as Varney and National Air Transport, decided that he would make a study of the European aviation insurance business. Using leave which he had accumulated, he spent several months in Europe at his own expense, studying the methods of the German Luftpool, London Lloyds and the French and Italian Aircraft Insurance Pools. During this time he made tentative arrangements for reinsurance if a proper group of American direct-writing companies could be gotten together.

Upon his return to New York he asked my advice in the selection of an individual who had stayed with aviation and had a thorough knowledge of it, to be his technical assistant. I recommended numerous people, all of whom were in the operating end of aviation. None of them could see much fun or profit in aviation insurance. I, like all of the rest of them, felt that nothing could be more boring.

Several months passed, during which time Beebe kept trying to sell me on the idea of going with him in the aviation insurance business. His final and cinching argument was that I had been the one who had constantly complained because American insurance companies were not doing their duty in assisting aviation to get started, and if I really believed what I was saying, I should make some sacrifices as to my personal wishes and join with him, and attempt to put some sense in aviation underwriting. I finally weakened and teamed up with him. We were then ready to go into the business except for the annoying detail that we had no companies to represent, but we had a lot of enthusiasm. Beebe and I wore out several pairs of shoes tramping the streets of various cities trying to interest insurance companies in forming an aviation pool. Unfortunately for us, many of the outstanding companies of the country had attempted to underwrite aviation immediately after the last War. Their experience had been uniformly disastrous. In fact, several of them had 100% loss ratios, not as we ordinarily understand the term—that is, losses in ratio to premium—but 100% of the risks which they had insured had crashed, burned or otherwise been destroyed.

After some very disheartening weeks, we decided that we had to sell the idea on the basis of patriotism. Both of us being disciples of General Mitchell, we sold aviation as a basis for national defense. We stressed the point that unless comercial air transport was encouraged in this country, the future would find the United States behind the 8-ball militarily.

You all know something of the remarkable

prophecies made by the late General Mitchell in his efforts to arouse the country to the need of an adequate Air Force in the interests of national defense, but you cannot fully appreciate the man and his uncanny predictions unless you knew him as I did. He predicted the attack on Pearl Harbor and the attempt at invasion of North America by the Japs by way of the Aleutians. He would stand on the deck of a Navy vessel and, looking across the water at some battle wagon, exclaim, "What a target for a bomber!"

I think you will all agree with me that the turn of events on the war front would have been impossible had it not been for Allied air supremacy, and I say that those of you who represent companies which were willing a decade and more ago, to lend their resources to the infant aviation industry, may feel a sense of pride that your company by so doing actively contributed to the winning of this War.

In every instance we told our prospective companies that unless they each were willing to face a loss of $50,000 per annum for several years, we would prefer that they not join our proposed pool. We knew and explained that there was no yardstick available for rate-making purposes and that we must necessarily learn by the trial and error method.

We were finally able to get four casualty companies and four fire companies to join together in the founding of the United States Aircraft Insurance Group. and we started writing on July 1st, 1928, as the first of several groups now doing business.

When Beebe returned from his study of aviation underwriting in Europe he was convinced above all that the sound approach to successful underwriting was through the Group or Pool Plan of operation. I believe there is no question that experience has proven he was right. Picture if you will the added costs which would have resulted from, let us say, thirty individual companies each writing aviation on its own in the form of thirty Aviation Underwriting Departments; thirty home office adjusters skilled in adjusting aircraft losses; and so on, as against the economies effected in the Group Plan which entails the cost of operation of one central office to perform the many required functions for all thirty companies.

Then there is the question of reinsurance to consider. It is obvious that a group of companies operating together may retain a far larger net line on any risk than a single company would retain in the interest of sound underwriting practice. This, therefore, means less reinsurance to be purchased and it also means that reinsurance as required may be purchased in the Group Plan under more stable conditions. While on the subject of reinsurance, you probably all have heard of the criticism leveled at the three major groups over the fact that much of their reinsurance has been placed in London. Let me tell you that we have tried through the years, right down to 1944, to interest the domestic Reinsurance Companies in participating even in a small way in our reinsurance, without success. It is perhaps fortunate for the industry that we have been able, as a result of confidence built up through dealings over a long period of years, to place many of the peak loads with London reinsurers through a brief exchange of cables from time to time as occasion demanded. This was especially true in relation to the insurance on new experimental high valued aircraft such as the United States Navy's flying boat Mars on which the three groups were asked to provide and did provide, $1,500,000 of Hull Insurance on its initial test flights. Had it not been for the development of the London reinsurance market through the early years during which the spirit of mutual confidence was built up at a time when the total aircraft insurance volume was exceedingly low, it would not have been possible for us to take care of the requirements of the industry as it mushroomed immediately preceding the War.

The combined assets of the companies now writing Aviation Insurance in the United States is probably in excess of 3,500 millions of dollars. The Group Plan with its automatic reinsurance arrangements subjects only a small part of the capital and surplus of any one company to loss on even a large or jumbo risk. This is as it should be if I have the proper conception of insurance.

We have no means of ascertaining the total payments made in claims settlement by aircraft insurance underwriters during the past fifteen years due to the fact that, as you all know, a number of companies entered the field and withdrew because of unfavorable loss experience during that period. However, the Fire Companies Members of the three Groups have paid approximately twenty and one-half million dollars in aircraft Hull claims and the Casualty Members of the same three Groups

have had incurred losses of approximately twenty-three million dollars. This makes a total of forty-three and one-half million dollars of losses incurred by the three Groups, of which the USAIG contributed approximately 42%.

We believed the first fundamental in underwriting was to follow the fortunes of individuals whom we knew to be sincere in their desire to aid in the development of American aviation. We thought then, and still do, that sound management is the most important factor upon which to lay our bets. We knew that for several years, at least, profits accruing to anyone in aviation would be so small that there was no place in the industry for anyone who entered primarily as an opportunist and for his own selfish interests.

We are very proud of the fact that regardless of how hazardous a particular project appeared, we would insure it at the lowest possible rate if we felt the experiment would prove beneficial to the advancement of the aircraft industry. To name a few such hazardous undertakings, we insured Jimmy Doolittle's first instrument-landing experiments, the National Geographic Society's Stratosphere Flights, the first test flights of innumerable aircraft, regardless of how unorthodox they seemed, if we had confidence in the sincerity and ability of the design engineers, and the Daniel Guggenheim Safety Contest, in which many freaks of extreme nature were involved. We have followed the fortunes of Pan American Airways step by step in its world-wide expansion, and, needless to say, many of their first flights, over both jungle and ocean, were hazardous in the extreme.

On the other hand, we have consistently refused to insure flights which, in our opinion, were being made only for the personal aggrandizement of the individual or individuals involved.

Our first insurance policies contained innumerable warranties. These were considered essential for the protection of the operators themselves. We were very active in assisting the Aeronautics Division of the Department of Commerce in making new safety regulations, and many of the warranties in our policies were there long before the same requirements were incorporated in the Civil Air Regulations. For instance, we insisted that all aircraft seats be equipped with safety belts and that they be used in all landings and takeoffs. We insisted that pilots wear their safety belts at all times. I might interject here that my very dear friend, Bill Stout, used to argue with me by the hour on our safety belt requirements, as he felt that safety belts added to the fear complex of the average prospective air passnger. Our experience, however, was that many minor accidents were fatal where belts were not used. This later was proven to the satisfaction of the Department of Commerce and is enforced by all airlines today.

Aircraft and engines were, from inception, approved by type certificates by the Department of Commerce, but propellers were not. It was largely due to our persuasion that type certificates are required for propellers. The use of the recording barograph on the airlines was brought about largely through our endeavors. Hangar fires were a common occurrence in the early years of our underwriting experience. We spent thousands of dollars in educational work and in inspection of hangars, in eradicating what used to be deplorable housekeeping conditions—with the result that hangar fires until recently have been relatively few, and those few are caused principally by careless management.

In the old days flight operations and procedure were based upon contact flying which meant flights in bad flying weather were dangerous. From time to time unforeseen weather conditions set in and caused serious accidents. A gentleman by the name of Link realized that if air transportation were to expand, pilots would have to be trained to fly on instruments with the help of radio and other navigational aids. The Link Trainer resulted —a device for instructing pilots on the ground in the problems of flying by instrument in fog and bad weather conditions. Except for a few in the industry the Link Trainer was not taken seriously and served mostly as an attraction at amusement parks until we, as underwriters, recognized its advantages in the training of pilots in instrument flying. We convinced the airlines that they should purchase Link Trainers and use them in instruction of pilot personnel, and today every airline pilot must include in his training, operational procedure on the Link Trainer.

During 1929 we realized the necessity of educating most of those in the industry who had come up through the last War out of their wartime attitude of disregard of danger into a "safety first" philosophy. Following through with this thought, we secured the services of a specialty writer and flooded the industry in

all of its branches, from president to grease-monkey, with direct-mail letters and pamphlets in which we preached the gospel that "Safety Will Insure Aviation's Prosperity".

It is going to be necessary to emphasize this doctrine repeatedly in the future when the boys who are accustomed to flying P-38's upside down return to civilian flying jobs after the War.

We have attempted, to the best of our ability, to force the highest degree of safety in the manufacture of aircraft and aircraft parts and engines. On two occasions we have brought suit against manufacturers. In one case we demonstrated that a faulty propeller had caused a fatal accident on the airlines. It took us ten years to fight this one through the Appellate Courts. In another instance we went after an engine manufacturer when we suspected that dirty steel was responsible for an engine failure which caused a serious accident. There is no doubt in my mind that these two situations have caused all manufacturers to improve standards of workmanship, material and inspection. People all act pretty much alike when you tickle them on the pocketbook nerve.

Those of us who have pioneered aviation insurance feel that we have contributed much to the winning of this war because we backed, with insurance, practically all of the present aircraft industry when it was in its swaddling clothes, and without insurance it could never have obtained the necessary capital to proceed. Without commercial air transport and its resultant market for transport ships, the manufacturers would not have been in a position to do the job that they have done during this war, and without the aid of the airlines, our military services would not have been able to perform the prodigious job of logistics which they have accomplished. If it had not been for the financial security insurance furnished, our cow-pasture operators and small schools of yesteryear could not have existed, and therefore could not have expanded to do the tremendous job they have been able to do in the training of General Arnold's great American Air Force.

As evidence of the kind of support underwriters gave to the industry before it had its first teeth, I think I can best illustrate by telling you a true Horatio Alger story. Back in 1929 we paid a total loss on two aircraft of the same make within a short space of time. The planes were only partially damaged, one by fire around the motor and the other by submersion, but the owners, being very proud of their aircraft, insisted upon replacement with new aircraft instead of repair of the damaged planes. We were left with the salvage.

One day a young man came in to see me and stated that he and his partner had started an airplane repair shop out on Long Island, that they had been employed in the factory where our salvaged planes had been manufactured, and that they thought they were in a particularly good position to repair them for us. I was impressed with the sincerity and straightforwardness of this gentleman and made a deal with him to deliver the planes on memorandum receipt to his shop; they were to make repairs and sell the airplanes. The difference between the highest offer we had received for the salvage plus cost of repairs and what they could be sold for was to be split 50-50. They did an excellent job and were able to make a profit of several thousand dollars on each airplane for themselves as well as netting us a higher price than would have been received for the salvage of the airplanes as was. In other words, it was a good deal for all concerned, and I was particularly impressed with the business-like manner in which they had conducted their end of the bargain.

Several months had gone by when this same gentleman came in to see me again and stated that they had taken the profit which they had made on that transaction, together with other money that they had been able to raise, and had built a plane for the Navy on speculation which would be ready to fly in a short time. He explained that this plane was very highly experimental in that the wing construction was all metal except for fabric cover, and entirely different from anything previously done. He very frankly stated that all of the money that his partner and himself had been able to scrape together was invested in the plane, and that if it crashed, they were through. Thereupon, he began to tell me all the reasons why we should not insure the airplane, even stating that if he were in my shoes, he would not consider it for a minute—but if by any chance we could see our way clear to cover it, it would be greatly appreciated.

It so happened that we had recently quoted rates on a plane of somewhat similar design and containing the same metal wing structure

for an old established manufacturer. The honesty and sincerity of this gentleman so impressed me that I told him exactly what we had done for the large manufacturer, and that because of our confidence in him and his partner, we would give them the same coverage, at the same rates. Fortunately, the plane flew and was successful, leading to a contract for a considerable number.

Several years went by, during which time we insured not only prototypes but production aircraft as well. The total premiums on the account had amounted to approximately $40,000 without a loss when one plane spun into the ground, killing the pilot and completely destroying the aircraft. Within a short time a second of the same type spun in, although the pilot was able to jump in his chute. Thereby, the loss ratio which had been zero over a period of three or four years jumped to around 200% overnight.

Today these same men are among America's largest aircraft manufacturers. You see the names of their well-known types, the Wildcat and the Hellcat, in the newspapers every day. The men were Roy Grumman and Jake Swirbel, and unless we or someone else had furnished insurance during their early struggles, it is highly improbable that the outstanding contribution the great Grumman Aircraft Engineering Corporation has made to the winning of this War would have been possible.

In 1935 the USAIG made available to passengers on the schedule airlines complete accident insurance at a rate which compared favorably with accident insurance rates for other means of transportation. Until we brought out Airsurance the sales and traffic representatives of the airlines were reluctant to have the possibility of accident brought to the minds of the traveling public for fear of the sales resistance that would result from fear psychology, but when we launched our Airsurance Program in December, 1935, the airlines worked with us to develop the widest spread of risks among their regular flying public. That which had been considered as something which would encourage sales resistance was overnight turned into a recognition of confidence. There seems to be no doubt that the development of Airsurance contributed in part to the steady growth of airline traffic through the years.

More recently, as of January 1, 1944, in order to protect airlines insured by us from having to make contributions out of their own pockets should the Principles of General Average be held applicable to Air Commerce, we extended all Hull policies issued to airlines to include General Average Contributions, without additional premium charge.

The management of several of the pioneer airlines of this country felt that no liability should attach to the operator where people were injured or killed in aircraft, primarily because the person involved knew that he was embarking on a dangerous venture. We could not see eye to eye with this school, and felt that aircraft operators should accept liability the same as any other common carrier and in no way attempt to limit it in the language of their tickets. It has been our policy since we started in business to attempt to settle all liability claims of our assureds promptly and fairly. We have never been subject to criticism on the part of our assureds or anyone else knowing the facts in the matter of settlement of liability claims, and we believe this policy has inured immeasurably to the benefit of commercial aviation in America.

There have been, as you know, proponents of absolute but limited liability for death of or injury to passengers in air transportation. The Warsaw Convention which provides limitation of liability in respect to passengers on international flights was ratified by the United States in 1934. We are glad that the United States is a party to the Convention because we feel that as respects International Air Commerce our aviation should enjoy the same advantages as foreign airline competitors. In domestic air transport on the other hand, competition comes not from foreign airlines but from other types of carriers such as railroads and buses. We do not feel that airline operators should be less responsible for injuries than operators of competing forms of transportation, such as railroads, bus lines and inland steamship companies. There seems to be no good reason why one should be worth less if killed in a domestic airline accident than in a domestic railroad or auto accident, but this is obviously a question concerning which the airlines themselves should take the lead.

All of you are familiar, in the broader sense, with the part insurance, generally, has played in the carrying out of our war program, but I am going to mention here briefly the contributions made by those of us engaged solely in Aviation Insurance. In cooperation with government authorities we have devised insurance forms to cover new undertakings such

as the Civil Aeronautics Authority War Training Program, which was a project for the flight training of civilians, the so-called Army-Training Program which consisted of the training of Army personnel by civilian schools with the use of Army equipment under the direct supervision of Army flight officers, and the Civil Air Patrol which was an adjunct of Army and Navy defense activities. We have had the problems of insuring mass delivery flights from coast to coast of military aircraft for our present Allies, as well as delivery flights of American aircraft throughout South America for the airlines there which had divorced themselves from Axis control. There was the training of South American students in schools in this country. The domestic airlines under the direction of the Air Transport Command undertook operations throughout the entire world over many routes, some of which had never before been flown—we insured them.

Each and every one of these operations required the stability and service which insurance alone had to offer. Many of them presented catastrophe hazards which had not previously arisen in the history of aviation, and notwithstanding our years of experience in aviation insurance, we had not a single yardstick by which to measure the hazards involved. The aviation insurance market provided all the necessary insurance at rates which were based largely upon judgment in the absence of experience. In some cases our judgment rates were on the high side, but they were reduced periodically to reflect the known exposure as experience was acquired. In other cases our judgment rates were too low and they were increased for the same reasons.

I mention these points to illustrate the fact that while it was necessary for us to use judgment rates almost exclusively for these undertakings, we certainly were not desirous of making an undue profit on business connected with the war effort; but by the same token we did not want these undertakings to produce an undesirable loss ratio. Had the latter condition occurred it inevitably would have brought about a general increase in aviation insurance rates which would have been extremely unfortunate, particularly at this time when there appears to be a tendency of all nations to grab as many world air routes as possible. Many of the risks of the classes I have enumerated have not as yet run off. It appears at the moment, however, that taking all the coverages across the board the American aviation insurance market will just about break even, from a dollars and cents standpoint, on the part it has played in the Government Insurance Program.

The saying used to be "Imitation is the sincerest form of flattery"; in these days the phrase should be "*Investigation* is the sincerest form of flattery." We in the aviation insurance business are proud to say that we have been the recipients of such flattery. First the paid staff of the Air Transport Association "investigated" us and issued a report which contained some rather sweeping and, we believe, unfounded criticisms of the aviation insurance market and some revolutionary plans for the future. We answered the criticisms by a statement of the facts. The revolutionary plans have been met so far by a completely negative response from the directors and members of the Association.

The Civil Aeronautics Board has also conducted a lengthy investigation of the aviation insurance market and has issued a report thereon. We issued a reply to the report in which we pointed out the many inaccuracies it contained and took issue with a number of its conclusions. We have been criticized for doing so on the grounds that it is mistaken policy these days for private business to risk antagonizing government bureaus because of the power they wield. I do not agree with this criticism. I do not believe that our democracy has fallen to so low a state nor do I believe that the members of the C.A.B. whom I know and hold in high regard, are the sort who resent a presentation of the facts.

I have tried to cover what insurance has done for aviation during the past and what it is doing at the present. I would like to touch briefly on what it must do in the future. I do not want any of the statements I am making to be taken as prophecies because I will try to confine what I say to only those things which we know will face us in the immediate postwar years.

First, we know that 21-passenger $150,000 aircraft will be replaced as rapidly as possible by 48-passenger aircraft worth approximately $400,000 each. We know that many aircraft of 100-passenger capacity and probably valued in the neighborhood of $1,000,000 will be added to our domestic and international airlines. We know that a limited number of even larger aircraft and of considerably higher

value will be in use throughout the world within a few years after peace is declared.

Prior to the War insurance was essential on all experimental prototypes as well as on test flights of production aircraft. Since the War began, the Army and Navy have assumed this risk. When peace is declared, the manufacturers again will require insurance covering prototype testing and production tests. We will undoubtedly see more highly experimental aircraft in the years following the War than we have seen in recent years. Jet propulsion offers great possibilities, certainly for military types, and may eventually become a source of power for commercial aircraft. The helicopter is in its infancy. Much development is to be expected in this type.

Claim service must of necessity be developed world-wide as the airplane has no natural boundaries. Political borders alone will influence international air travel. Insurance will again be faced with a tremendous job of safety engineering—first, because the Civil Aeronautics Authority, which has done such a wonderful job in making flying safe, has had its personnel badly disseminated by the War, and we anticipate that it will take some time before they will again be sufficiently organized with the proper personnel to perform the same high quality of service to the industry they were doing previous to the War.

I for one do not believe that human nature changes very much. After the last War returning Service pilots had a philosophy that was not conducive to safety in flying. I anticipate the same thing will be true after this War. From my own experiences in the last War I know that one who has dodged flak and machine-gun bullets day in and day out over a period of months develops what is, to say the least, a callous attitutde toward sudden death. This attitutde, combined with aircraft of low horsepower and much lower factors of safety than are incorporated in military aircraft, will lead to many needless fatalities unless prompt steps are taken to control civilian flying after the War.

We have noticed in recent months a tendency to return to the bad housekeeping conditions which existed during our early days. This carelessness has resulted in an increasing number of hangar fires and windstorm losses. So insurance has a big job cut out for itself in assisting America's postwar aviation expansion.

There are about seven hundred fire and casualty companies doing business in the United States, and less than one hundred fifty of these are currently writing aviation business. This leaves around five hundred fifty not writing aviation. No doubt it will seem to many of these companies that right now is a good time for those who are not in this dynamic and most interesting business to get their feet wet. Of course, some who enter now may have the sad experience which all companies writing the business did following the last War, and retire from business. However, they will always have that sense of satisfaction which comes from contributing to an industry destined to play so important a part in our future lives.

On the other hand, some may be successful, as the three surviving Groups have been. If they are, they will have the great honor of being investigated by some Government body and accused of having made a profit. I can, however, promise one thing—those who enter the field will never have a dull moment.

DISCUSSION

BY FRANKLIN J. MARRYOTT, *Counsel,*

Liberty Mutual Insurance Company

Boston, Mass.

THANK you, Smythe Gambrell, for the opportunity to talk about this fascinating subject and congratulations, Reed Chambers, on your intensely interesting paper. To you and your associates is due the special gratitude which is earned only by the true pioneers of the generation. Your initiative, daring imagination, foresight and skill has enabled you to make contributions of such importance that their true value and significance are as yet but dimly perceived.

You are able today to point to a proud record of twenty years of service to aviation and to insurance. I venture to predict, however, that twenty years from now even you will look back with amazement and with increased pride at the growth of aviation insurance and at the great structure which will have been erected upon the foundation so well laid by your organization.

I speak with no such authority as yours. I can lay claim, however, to a record of sustained interest in aviation law dating back to my law school days. In 1930 I was a contributor to the first issue of what I believe was the first legal publication in the United States

devoted exclusively to the legal problems of the airways (I refer to the Air Law Review—published by the Law School of the U. of N.Y.) and I suppose that, in one sense, speak as a representative of the 550 companies whose feet are hardly wet yet (I maintain that the feet of my own company are at least damp and you would agree if you knew about some of the claims we have) and it has been necessary for me to consider very carefully whether the contributions we may able to make will be sufficient to justify running the risk to which you have referred.

It would be foolhardy for me to attempt to foresee the details of, or even the direction of, progress in aviation insurance. I want, however, to discuss two subjects which seem to me to need consideration—first, that of policy forms and second, capacity in the United States Aviation Market.

All of you know of my interest in the forms of policies which are employed to express the obligations which insurance companies undertake. You will agree that in the past ten years the improvement in policy forms, especially for Automobile Liability and Automobile Physical Damage, has been very substantial and has kept pace with the growth of the automobile industry during that period.

It would seem reasonable to hope that aviation forms will run a similar course. They are off to a good start, although I must confess that after making a review of a rather bulky file of aviation forms I can appreciate the feelings of the Louisiana Judge who, writing the opinion in Lyons v. Aetna Casualty Company (Ct. of Appeals—5-29-44), remarked:

" . . . the policy covered one chauffeur, two inservants and one expense constant. We are not sure we understand what is meant by 'expense constant', though we have had it explained to us."

Many of the Aircraft Hull Policies contain an exclusion which denies the application of the insurance with respect to loss or damage

"(c) occurring while *any regulation of the Civil Aeronautics Authority relating to the safe operation of aircraft* is not complied with or while the aircraft is being used *for any unlawful purpose* if such violation or use is with the knowledge or consent of the assured. . ."

The latter part of the exclusion is also found in many of the Aircraft Liability Policies.

I have never been able to appreciate the need for such exclusions. Mind you, the denial is flat; i.e., if the accident occurs *while* the plane is being used for the unlawful purpose the denial is applicable even if the unlawful use is in no way a cause of the accident.

It is unlawful to transport cuttings of the beautiful Ni-Ki hydrangea plant, found only on Nantucket Island, to the mainland. If I were a passenger in a plane from Nantucket to Boston and placed such a cutting in my pocket, telling the owner-pilot what I was doing, especially if I were making the trip for the sole purpose of improving my garden by the addition of this most attractive and exotic flower, and the plane crashed in landing because the pilot possessed poor depth perception or was color blind or because of mechanical failure or for any other cause the company would have a right to deny liability as to the Hull damage and also as to my claim for bodily injuries.

This exclusion bears a close parallel to the one which was the subject of so much discussion back in 1939 when we were working on Standard Provisions for Automobile Physical Damage Coverages. That one read:

"while the automobile is used in any illicit trade or transportation."

The Mutual Alliance Companies had never used it, so far as I know, but the N.A.U.A. Companies had used it for years and regarded it as being of considerable importance. The outcome of the argument was to make its use optional and there the matter rests. Some writers of Automobile Physical Damage insurance still use it but many do not. No rate differential is made and to the best of my knowledge loss ratios of companies which use the exclusion are not appreciably worse than those which do not.

I suggest that aviation underwriters would do a service to the industry to reconsider the need for this exclusion. Are we not sufficiently advanced so that we can rely upon law enforcement officials to enforce laws rather than upon provisions in insurance policies?

Many aircraft liability policies deny the application of the insurance if the injury or damage results from

". . . such aircraft being used for closed course racing. . ."

This roughly parallels the exclusion which was in the original Standard Provisions for Aviation Liability Policies which denied coverage while the automobile was used

". . . in any prearranged race or competitive speed test. . ."

This was dropped, as no longer necessary, at the time of the 1940 (2nd) revision.

It would seem that is might be possible to underwrite aviation business so as to drop such an exclusion from those policies.

It took the automobile business until 1941 to make up its mind to drop the age exclusion; i.e., the one which denied coverage if the operator was under the "minimum age required to obtain a license . . . or by any person under the age of 14 years."

Some companies still retain it but no perceptable difference in results have been observed. The fact of the matter is that operation by those under age is rare—not because of policy provisions, but because of laws which forbid such driving.

I wonder if the time won't come when it will be possible to drop from aviation liability policies the exclusions which deny if the injury or damage results from " . . . violation of the terms of the Civil Aeronautics Administration Pilots Certificate or Airworthiness Certificate of such aircraft . . ." or from operation ". . . in violation of the regulations of the Civil Aeronautics Administration applying to:

1. Acrobatic flying;
2. Instrument flying;
3. Repairs, alteration and inspections;
4. Night flying;
5. Minimum safe altitudes;
6. Student instruction."

I concede that point made by Mr. Chambers, namely, that many of these restrictions were put in the policies for the protection of the operators themselves. I question the necessity for their continued use now that such a large body of laws and regulations have developed. The question is not easy. It is complicated by the many questions which arise as to the power of the Civil Aeronautics Administration with respect to "atmospheric wanderings" which fail "to include any contact with interstate commerce in its various ramifications". (See "Mr. Drumm and the C. A. A.", by Paul McNamara—Air Facts—September, 1944.)

One more point on policy forms. It is customary for automobile owners to buy both the Physical Damage and the Liability coverages on a combination policy in which one company writes the Liability and the other the Physical Damage coverage. So far as I know, few, if any, companies write both coverages on the same policy even if they have charter to do so.

I submit that the aviator's interest would be served if he could buy both coverages from the same company on the same policy; this will become possible if the fourth recommendation of the "Multiple Line Underwriting Committee" is adopted.

This committee, appointed by the president of the National Association of Insurance Commissioners reported to a subcommittee of that organization at its June, 1944 meeting. The recommendation in question is:

"IV. *Aircraft Insurance*

Any fire or marine insurance company, or any casualty or surety company licensed to write liability insurance, should be empowered to write insurance against any and all of the hazards of loss from damage to aircraft, or from liability arising out of ownership, maintenance or use of aircraft, provided such company meets the financial requirement which must be met by a company qualified to write aircraft physical damage or aircraft liability hazards, whichever requirement is the higher."

* * *

Now as to aviation insurance capacity in the United States—particularly reinsurance capacity.

Here I want to avoid controversy and will be as factual as possible. I quote a passage from the Report on Air Transport Insurance by the Air Transport Association of America (3-27-43), page 40:

"F. *Federal Reinsurance Legislation*

"The insurance companies writing air transport risks are unable to absorb the full amount of the risks against which they insure. As is the normal case with most types of insurance, these companies quite properly spread the risks they assume through reinsurance.

"The present companies reinsure to a considerable extent with reinsurers who are foreign-owned or controlled. The plain fact of the matter is that American insurance companies are obliged to reinsure abroad for one of two reasons—either because the foreign companies offer lower rates, or because the capacity of the American reinsurance market is not sufficient to provide the required coverage. While there has been some reduction in the amount of air transport insurance placed abroad, it can be

readily seen that as air transportation expands, regardless with what insurance companies the airlines insure, it will continue to be necessary for the companies to reinsure abroad. Serious consideration should, therefore, be given to the possibility that steps can be taken at this time which will enable American insurers of air transport risks to avoid reinsurance with foreign concerns and at the same time encourage the development of an independent American aviation insurance market adequate to meet all contingencies."

This report goes on to make certain recommendations to the effect that the problem be solved through the enactment of Federal Legislation.

I quote now from "A Study of Aviation Insurance", Civil Aeronautics Board, 1944:

"On the other hand, reinsurance abroad has been substantial, and in fact, the British insurance market has been the primary source of reinsurance for our aviation insurance market. . . the percentage of premiums for reinsurance with foreign insurers has averaged 48.1 per cent of the total premiums of the three groups during the five year period, 1938-1942. During this period the three underwriting groups paid $20,911,131 in premiums for reinsurance abroad, while at the same time these groups have reported only $6,471 of reinsurance flowing to them from foreign insurers.

"There has, however, been a substantial decline in the percentage of premiums going abroad . . . The explanation . . . is not known, but the increase in net retention by insurance companies domiciled in this country which this trend apparently indicates appears to represent a desirable development." (Page 19.)

"Any group which must go abroad for reinsurance may discover that the foreign underwriters will reinsure the higher limits of liability only upon condition that they participate in the entire insurance written. Unless an American reinsurance source can be found, American insurers will be under the necessity of accepting such terms in order to enable them to write the insurance at all. . . . There appears to be no reason to doubt that American insurance facilities, if properly organized, can compete successfully with foreign reinsurance." (Page 36.)

I take it that the need for additional facilities in the American market cannot be denied. I submit that the need must be met and that if private industry does not meet it, we may reasonably expect that it will be met by governmental action. I suggest that by a single easy step to be taken by the states the capacity of the American reinsurance market can be expanded enormously. This is the adoption of the second recommendation of the Multiple Line Underwriting Committee which is:

"II. *Reinsuring Powers.*

Any fire, marine, casualty or surety company should be empowered to accept any and all kinds of reinsurance, other than life insurance and annuities, provided it maintains a minimum policyholders' surplus of $1,500,000."

I urge that these matters receive your earnest consideration—not on the basis of my convictions or those of any partisan group, but upon the basis of the unbiased studies which have been made.

DISCUSSION

BY HARRY W. RAYMOND, *Assistant Counsel, Lumbermens Mutual Casualty Company Chicago, Illinois*

THERE is a giant at our gates. Three years ago we bade farewell to the infant aviation industry as it dashed off to do its bit in the war. In war the industry has found its Aladdin's Lamp, and now returns to us a veritable giant.

This giant does not seek to devour us, but rather seeks our help. It is to be our privilege to provide facilities for his protection—facilities which have proved so effective in the progress and development of other forms of commerce and industry.

After the war the aviation industry no longer will be merely an organized group of commercial airlines, freight lines or manufacturers, but will involve all these conflicting and diverse interests together with a very large group of people who are now and then will be owners of aircraft. Already the return of 3,500 planes to private owners has been announced, and the Office of War Mobilization has informed aviation insurance agents they may again underwrite Hull insurance for these craft.

The protective armor for the giant aviation industry cannot be cut from the patterns which are now in our shop. Just as it will be necessary for the automobile industry to retool in preparation for its postwar models, so must the insurance industry replace its tools, dies and moulds with others designed for the new product.

While automobiles have a very great degree of responsibility for accidents in which they are involved, the airplane, not operating in or upon a single, fixed plane, presents a vastly different problem. For example, a person sitting quietly in his living room may be injured or killed by an airplane which falls and crashes into the house; this same person, if injured by an automobile upon the highway, at least has had the opportunity to hear or look for the approach of the automobile by which he was injured.

The operation of aircraft is accompanied by a very high degree of liability. Whereas a private carrier owes to his passenger the exercise of ordinary care, a public carrier owes the duty of exercising the highest degree of care for the safe carriage of passengers and must provide the best equipment and facilities for the purposes of safe transportation. The responsibility of the operators of aircraft is severe with respect to injury to persons and property on the ground.

Equally great is the problem presented to the aviation industry with respect to policing and regulation. The science or art of flying is such as to require the establishment of an intricate system of airports, manufacturing and service facilities, and traffic regulation.

At the present time the insurance business generally is supervised by the states—and well supervised. So far as the insurance industry is concerned, it is to be hoped that such supervision will continue. However, it is obvious that aviation insurance presents a special problem to which a special approach is necessary. The operators of airlines have indicated willingness to cooperate toward a satisfactory solution; they are willing to accept the kind of insurance and supervision which is requisite to their success and protection, and are willing to operate under rules which, in many cases, will impose strict liability; they ask only that such liability be limited to specified and reasonable amounts.

The young, sturdy aviation industry collides with the traditions and fixed rules of the insurance business—the very fine lines of distinction between numerous kinds of coverage, a variety of special rates which have been made for known, fixed hazards and based upon the experience of ordinary liability over a long period of years.

Here is the challenge. The progressiveness of our own industry will be tested by our reaction to the potentials of the aviation industry. If the insurance industry is not to be found wanting it must, while the aviation industry is young and in the formative stage, cut down the barriers and bars, cut through the red tape of tradition, and immediately work for what should be the comparatively simple answer—a broad and comprehensive coverage.

The insurance industry must do the job—and do it with uniformity. Here is one place in the insurance business where national uniformity of coverages probably can be attained to a greater degree than has been possible in any other form of insurance.

True, the insurance industry has already displayed, with considerable reluctance, a certain willingness to undertake some of the unmeasured hazards incident to the aviation industry. The insurance policies now in use for the provision of coverage for the various hazards incident to air transport are being studied with a view to possible improvement.

It has been predicted that eventually aircraft insurance will tend to become more and more comprehensive until one policy will cover every conceivable aviation exposure.

If the insurance industry is to keep step with the aviation industry, we must see to it that the only questions to be solved are merely questions as to the determination of a proper rate for a given hazard—not which and how many different policy forms can be designed for any such hazard.

Air travel today is relatively safe because of the courage and imagination of pioneers in the aviation industry. Mr. Chambers has shown clearly and interestingly how the trials and tribulations of the pioneers in aviation insurance have removed or made less formidable many of the hazards. Are we to display less courage and imagination?

The insurance business has a very large stake in the decisions to be made. I am confident the insurance industry will unite to assist the aviation industry, through research, counsel and cooperation, to arrive at the right answers, legislatively and administratively.

Limitation of Liability in State, National and International Legislation Affecting Aviation Insurance

By Hamilton O. Hale
New York City

THE subject of aviation liability has had, relatively a long history. It may be traced as far back as 1822, the year of the renowned forced landing of the balloonist Guille in the vegetable garden of Swan.[1]

It is usual to consider problems of liability in this field under three classifications, first, with respect to passengers and goods carried; second, with respect to persons and property on the ground; and third, with respect to collisions in the air.

A brief summary of the liability law of other forms of transportation may assist us in determining what is desirable and fair for aviation.

Railroads.

There is no federal statute covering the question of railroad liability to passengers for injuries or death. The matter is ordinarily governed by the common law of the states. The general rule is that while the railroad is not liable as an insurer, it must exercise the highest degree of practicable care toward its passengers. However as to property, the railroad is liable as an insurer.

Motor Carriers.

The general rules of common law liability applicable to carriers for injuries to or death of passengers and damage to property carried, as set forth above with respect to railroads, apply also to carriers by motor vehicle.

The Carmack Amendment to the Interstate Commerce Act passed in 1906 provided that common carriers, railroads, or transportation companies subject to the Interstate Commerce Act receiving property for interstate transportation must issue a receipt or bill of lading and become liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or connecting carriers. It was further provided that no contract, rule or regulation could exempt the carrier from the liability imposed. Finally, the initial carrier was given a right over against connecting carriers for injury or loss occurring on the latter's lines.

Eighteen states have passed so-called financial responsibility laws for motor carriers. Typical of this type of legislation is the Uniform Automobile Liability Security Act, which has been enacted in most of these states.

Carriers by Water.

There are a series of statutory provisions regulating the liability of shipowners. The Harter Act[2] is perhaps the chief one. It provides that it shall be unlawful for the owner of a vessel engaging in foreign trade to relieve himself by contract of liability for loss or damage to property carried arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery.

A common carrier by water is under a duty to use the highest standard of care toward its passengers, but it is not an insurer of their safety. Hence, it is liable only for personal injuries which the proper degree of care, skill and diligence could not anticipate or prevent. By statute, where the injury occurred without the privity or knowledge of the owner, the liability of the owner of the vessel may not exceed the amount or value of the interest of such owner in such vessel and her freight then pending, except that in the case of any seagoing vessel, if the owner's interest is insufficient to pay all losses in full, then such portion shall be increased to make up the difference up to $60.00 per ton of the vessel's gross tonnage.[3]

General—Wrongful Death Acts.

A word should be said concerning wrongful death acts. In thirty-four states and territories the wrongful death acts place no limitation upon the amount of damages recoverable. In nine of these states there are constitutional provisions prohibiting such limitation: Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania, Utah and Wyoming. In most of these states specific constitutional provision was necessary to permit the passage of workmen's compensation acts.

Eighteen states and territories have statutes

[1] Guille v. Swan, 19 Johns. 381 (N.Y.).

[2] 46 U.S.C.A. 190.

[3] 46 U.S.C.A. 183.

limiting the maximum amount recoverable for wrongful death: Alaska, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Virginia, West Virginia and Wisconsin. In the great majority of these states the limit is $10,000. In two states the limit is $15,000, in one state $12,500, and in one state $5,000.

Mention might also be made of the Death on the High Seas by Wrongful Act, a federal statute[4] which provides for suit in an admiralty court with no limitation on amount of recovery.

AIRCRAFT LIABILITY LAW

Let us examine the statutes now in force in the United States upon this subject. Most important with regard to domestic flying is the Uniform Aeronautics Act, approved in 1922 by the National Conference of Commissioners on Uniform State Laws. It provides in Section 5 that the owner of an aircraft shall be absolutely liable for injuries to persons or property upon the ground, except where the person injured was negligent. Section 6 provides that the liability of the owner of one aircraft to the owner of another aircraft, or to the aeranaut or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land. Except for collision cases, no provision is made regarding liability for injury to passengers or for loss or damage to goods carried. Twenty-five states have adopted this Act: Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania (in substance), Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin and Wyoming. Hawaii also has adopted it. Wyoming, Missouri and Montana have omitted the ground damage section, and Arizona provides for a negligence standard for damage occasioned by forced landings. Illinois has adopted certain of the sections but in general its law is dissimilar. Arizona, Kentucky, Louisiana and Virginia require air carriers to maintain liability insurance.

It is apparent from the foregoing that the question of liability for injuries to passengers or property carried by aircraft within the United States has had slight statutory recognition. With the exception of Maryland, which applies the liberal rules of maritime law, the few state statutes covering it provide that liability shall be determined by the rules of law applicable to torts on land or, in other words, a negligence standard. Thus one is led back to the ordinary common-law rules of carrier liability. As regards the liability of common carriers to passengers, it has been held that while the air carrier is not an insurer of the passenger's safety, it must exercise the highest degree of care consistent with practical operation.

Although the regular rule regarding private carriers by air is that reasonable or ordinary care only is required, some courts have imposed upon private carriers of passengers a duty to use the highest degree of care. Several cases, however, use the test of reasonable or ordinary care with regard to private carriers.

The doctrine of *res ipsa loquitur* has been applied in a number of cases for injuries to passengers. Many other decisions have refused to apply the doctrine on the theory that its application was improper under the particular circumstances involved.

A word of explanation should be added with regard to the doctrine of *res ipsa loquitur*. Unfortunately, this term has no very precise meaning and is used by the courts to mean several different things. The first meaning is that a showing of the mere fact of the accident by the plaintiff is sufficient, if the defendant introduces no evidence showing non-negligence, to permit the jury to infer negligence. Under this view the plaintiff still has the burden of proving negligence by a preponderance of the evidence, as it is sometimes expressed, or, to state the matter in another way, he has the burden of convincing the jury that more probably than not the defendant was negligent. The question for the jury is whether the fact of the accident alone is sufficient to establish this.

The second meaning is that if the fact of injury is shown and the defendant fails to introduce evidence showing non-negligence, the court *must* direct a verdict for the plaintiff, i.e., a compelled inference. Once the fact of injury has been shown, the defendant has the burden of producing evidence on the issue of negligence. If he fails to introduce evidence, he automatically loses the case. As we shall see later, this principle appears to have been

[4] 46 U.S.C.A. Sec. 761, 762.

incorporated into section 1212 of the O'Hara bill, recently introduced in Congress.

The third meaning is that the burden of persuasion shifts from the plaintiff to the defendant. This interpretation is not inconsistent with the first and second interpretations of the doctrine; it can exist in addition to either of them.

By burden of persuasion is meant the burden of pushing the minds of the jury beyond the equilibrium point. In the ordinary negligence case the plaintiff has the burden of producing sufficient evidence to convince the jury that more probably than not there was negligence. Under the third meaning of *res ipsa loquitur* this burden is placed on the defendant. The defendant in order to obtain a verdict has to show that more probably than not there was no negligence. This interpretation, as well as the second, also appears to have been incorporated in section 1212 of the O'Hara bill, thereby shifting the burden of producing evidence and the burden of persuasion to the defendant, and in doing so it follows the precedent of the Warsaw Convention.

Another statutory precedent for shifting these burdens is section 2(b) of the Clayton Act, 49 Stat. 1526, 15 U.S.C.A. Sec. 13. This provision was added to the Clayton Act by the Robinson-Patman Act. It provides that where a complainant under section 2 has shown price discrimination between different purchasers of like grade and quality, the burden of showing justification of the price differentials shall be upon the person charged with a violation of the section.

Developments in International Law Affecting Aviation.

The Warsaw Convention of 1929 was adopted by the United States in 1934, is in force in 30 countries, and applies to international flying between the United States and countries which have adopted it. At present it applies to the majority of our international flying except Canada, Cuba, Argentina, the West Coast of South America and Portugal.

The Warsaw Convention covers liability for injuries to or death of passengers and for loss or damage to property carried by aircraft for hire and to gratuitous carriage by "an air transportation enterprise."

The Convention provides for absolute liability for injury or death of passengers in the amount of actual injury with a miximum limit of about $8,300. The carrier and passenger may by special contract agree to a higher limit of liability. The carrier can free itself of liability if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. The passenger may recover unlimited damages if he proves the accident occurred through the wilful misconduct of the carrier. Contributory negligence is a partial or complete defense, depending on the law of the forum. With regard to baggage and goods, the carrier is freed from liability if it can show no negligence or if the damage or loss was caused by errors in piloting, navigation or handling of the aircraft. Maximum liability for damage to or loss of baggage and goods is limited to approximately $8 per pound unless the consignor makes a declaration of a higher value and "has paid a supplementary sum if the case so requires."

The United States has not adopted any convention covering collision in international flying. The International Conference on Private Air Law has in the past had upon its agenda a proposed convention on this phase of liability, but in 1938 upon the urging of the American delegates it was referred back to the C.I.T.E.J.A. for further consideration as premature because of lack of sufficient data and experience.

In Great Britain the Carriage by Air Act, 1932 (c. 36) adopted the Warsaw Convention rules for international flying. Section 4 of the Act gave power by Order in Council to apply the rules of the Convention to internal carriage in the United Kingdom and all or any of the British territories, protectorates or mandates. As yet this has not been done. The same type of act was passed in Ireland in 1932. In 1939 Canada enacted the Carrier by Air Act and gave power to the Governor in Council to apply the Warsaw Convention internally. No Order in Council has yet been issued.

It may be of interest in this connection to mention the 1943 decision of the New York courts in *Wyman v. Pan American Airways, Inc.*[5] This was an action arising out of the death of plaintiff's testator who was en route from San Francisco to Hongkong, and was lost when the plane disappeared without trace over the Pacific Ocean on or about July 29, 1938. The trial court held that the rights of parties were fixed by the Warsaw Convention and allowed recovery that "would otherwise

[5] 181 Misc. 963. (Aff'd. without opinion, 267 App. Div. 947.)

be impossible for want of proof." In that case there was no proof of any negligence proximately causing the accident. Nor was the defendant able to offer any proof in rebuttal of the presumption of liability. The court directed a verdict for plaintiff in the sum of $8,300. In answer to the claim that the flight was not international since the plane was lost on a leg of a flight between Guam and Manila, both within the jurisdiction of the United States, the court held the Warsaw Convention was applicable since the original place of deceased's departure was San Francisco and his destination Hongkong according to his ticket, and that such a fact was controlling despite interruptions in travel en route.

In *Phillipson v. Imperial Airways*,[6] decided in 1939, the Privy Council of the House of Lords held that goods shipped from England to Belgium and stolen at Croyden Airport were subject to the Warsaw Convention as being a shipment between two high contracting parties, although at that time Belgium had not ratified the Convention, being only a signatory thereto.

As to ground injuries and damage, there is the Rome Convention of 1933, which was intended to cover international flying. This Convention has been adopted by only four countries: Spain, Rumania, Belgium and Guatemala. It is not operative anywhere because the Convention provides that it shall not become effective until *five* countries have adopted it. It provides for absolute liability for injury to persons or damage to property upon the surface caused by an aircraft in flight or any body falling therefrom.

In Great Britain the Air Navigation Act, 1936, adopted the principles of the Rome Convention and applied them internally. This Act also provided for the discretionary issuance of an Order in Council for ratification of the Rome Convention, which has not yet been done.

In the United States, the inadequacy of the Uniform Aeronautics Act was early recognized, and beginning in 1929 the Committee on the Uniform State Aeronautical Code of the National Conference on Uniform State Laws, first in conjunction with the American Bar Association and later in cooperation with the American Law Institute, engaged in drafting proposed aviation legislation. The American Law Institute prepared a "Restatement of the Law of Torts" in which it attempted to state the law of aviation liability and the theory of flight. This statement was challenged as inaccurate and as embodying principles of law not desirable to apply to torts arising in the field of aviation. In order to unify their activities, these three organizations formed a joint drafting committee, held public hearings in 1937, and in July 1938 the National Conference on Uniform State Laws approved a proposed Uniform State Aeronautical Code. This Code consisted of three measures: the Uniform Aviation Liability Act, the Uniform Law of Airflight, and the Uniform Air Jurisdiction Act.

In 1935 the Uniform Airports Act and the Uniform Aeronautical Regulatory Act were completed by the Commissioners on Uniform State Laws and have been adopted in a number of states. In 1938 the Aeronautical Law Committee of the American Bar Association was reported as favoring Federal legislation rather than State legislation.

At the time of the approval of the Uniform State Aeronautical Code it was understood its promulgation to the various states would be withheld pending further consideration of the matter by a Committee of the Commissioners. In December 1938 this committee met with representatives of the scheduled air carriers to discuss certain phases of the proposal.

In the meantime, the Civil Aeronautics Authority had organized and begun its work of administering the new Civil Aeronautics Act. When the proposed Code came to the Authority's attention, it became apparent that the questions it raised were of vital concern to the Authority in its work. Accordingly, on December 5, 1938 a resolution was adopted by the Authority ordering a complete investigation and study of this matter. As a result, a comprehensive study was undertaken of all phases of aviation liability with particular reference to (1) the proposed Uniform Liability Act adopted by the Commissioners, (2) a Federal Aviation Liability Act which was being considered by a Committee of the Air Transport Association of America, (3) the Warsaw Convention relating to liability to passengers, and (4) the Rome Convention relating to liability to persons and property on the ground.

Before discussing the recommendations contained in the study, it would be pertinent to outline the purport of the proposed Uniform Liability Act and of the Federal Aviation Liability Act.

The proposed Uniform Liability Act makes

[6] 1939 Appeal Cases 332.

the aircraft operator absolutely liable for death or bodily injury to passengers arising out of and in the course of the passenger-air carrier relationship. For bodily injury and death of passengers not so occurring, liability is premised upon negligence. The Federal Aviation Liability Act, similar to the provisions in the Warsaw Convention, would make the operator liable for bodily injury or death to passengers coming within the scope of the Act unless the operator proved affirmatively that the injury was not due to his wilful misconduct or failure to use the highest degree of care.

The Uniform Liability Act establishes $10,000 as a fixed amount recoverable for the death of every passenger and limits recovery for personal injuries to passengers to $5,000, except for certain specified disabilities for which recovery is fixed at amounts varying from $3,000 to $10,000. The Federal Aviation Liability Act and the Warsaw Convention do not undertake to fix any schedule of compensation but impose a maximum limitation of $10,000 and $8,300, respectively, upon the provable loss for either injury or death.

The proposed Uniform Liability Act makes aircraft operators absolutely liable for loss, damage or delay to a passengers' baggage or personal effects or for goods shipped by air. Under the Federal Aviation Liability Act, the operator and the express agency have a similar liability unless each proves affirmatively that loss, damage or delay did not result from wilful misconduct or failure to use the highest degree of care, or that loss, damage or delay was caused by an error in piloting, in the handling of the aircraft, or in navigation. This proposal follows closely the provisions of the Warsaw Convention, and in doing so follows the maritime practice of exempting the carrier from liability for loss or damage due to perils of the sea or air.

On June 1, 1941 the study made by the Civil Aeronautics Authority was completed and a report was presented by Edward C. Sweeney, who was in charge of the investigation. This report has since become known as the Sweeney Report.[1]

The Sweeney Report reaches the conclusion that the common-law rules of negligence and proximate cause applicable to torts on land and to passengers of common carriers are not particularly well adapted to accidents occurring in *any modern form of transportation;* that in an alarming percentage of accidents the victim fails to recover what he should, and in other cases receives more than compensatory damages due to circumstances which frequently have little or nothing to do with the merits of his claims, and that expense, delay and uncertainty of application of common-law principles work hardships upon plaintiffs in all transportation negligence suits.

The Sweeney Report "discredits the contention that there are fundamental grounds for according aviation accidents a treatment different from that which should be accorded to railroad, motor bus, and private automobile accidents." The report holds that aviation liability legislation must be looked upon as an effort, in one field of transportation, to effect a reform of rules of tort liability along lines which might be applicable as well to other forms of modern transportation.

The conclusions reached by the Sweeney Report are that state legislation is not desirable; that the Warsaw and Rome Conventions should not be followed as to limitations or drafting; and that the Act being considered by the Air Transport Association should be abandoned in favor of a more comprehensive and complete federal act on the subject including compulsory insurance.

Recommendations of the Sweeney Report as to Standards of Liability:

As to Persons or Property on the Ground: They should be compensated for injuries directly attributable to the operations of aircraft, irrespective of the operator's negligence.

As to passengers: (1) Damage to passengers to be compensatory only—*except for the minimum of $2,500 for death*—and *scheduled* compensation in event of injuries.

(2) Maximum recovery in event of fatal injury: $15,000 or $20,000.

The Sweeney Report "sees no reason for the imposition of *absolute* liability in the manner suggested by the Uniform (State) Aviation Liability Act", but recommends, however, that the burden of persuasion should be fixed so that the operator would be absolutely liable unless he proves affirmatively and convinces the trier of the facts that he exercised the "highest degree of care or that his passenger's injury or death was at least in part due to his own misconduct."

As to property Carried—(1) Baggage and

[1]Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation: Edw. C. Sweeney, June 1, 1941.

Personal Effects: Same standards as govern injury to or death of passengers;

(2) Goods Shipped: Liability as an insurer where common carrier status is established.

An alternative recommendation is advanced as presenting fewer administrative and legal problems. Federal legislation is suggested authorizing a regulatory agency to require aircraft operators to carry "admitted" liability insurance to be payable in the amount of the policy directly to the person suffering loss on proof merely that the loss was directly due to the operation of the aircraft and on condition that such person release all claims against the insured. The person suffering loss could elect to reject the insurance and sue at common law *for unlimited damages.*

On June 14, 1944, Congressman O'Hara introduced H.R. 5020, which adds a new title to the Civil Aeronautics Act to regulate the liability of air carriers and foreign air carriers. Except for provisions dealing with injuries to persons and property on the ground, this bill is substantially similar to H.R. 1012, introduced by Congressman Lea in January 1943.

Since the bill appears in many respects to reflect the results of the study and attention given to the subject of aviation liability by the various groups we have mentioned, it would seem worthwhile to review it in some detail.

Article I.

This article includes the definition of terms used in the title and prescribes its scope. The title does not apply where its application conflicts with any international convention to which the United States is or shall become a party.

Section 1202 provides that the title shall apply although the accident occurred in such circumstances as to bring it under the scope of admiralty jurisdiction.

Article II.

This article covers liability for death or bodily injury to the passenger. The carrier is liable for such bodily injury or death unless it proves affirmatively that "the injury or death did not proximately result from a failure to use the highest degree of care on the part of itself or any of its servants acting within the scope of their employment." The liability is limited to provable loss in the case of personal injury to $50,000, and in the case of death to $10,000. The Civil Aeronautics Board is given jurisdiction to regulate the filing and approval of insurance policies, surety bonds or qualifications as self-insurers with respect to liability imposed by the article.

Section 1211 of Article II states that the article shall apply only if the injury or death occurred within the United States, territories or possessions or on or over the high seas.

Section 1212 of this Article imposes liability for any injury or death to a passenger during the period in which he is a passenger as defined by the Act. It would include all the time he is actually on the aircraft or engaged in boarding or disembarking, or in case of an accidental or forced landing such time as he is reasonably seeking to reach a place of safety. The Act would not apply while a passenger was in the aircraft terminal or on a bus operated by the air carrier to and from the terminal.

The liability imposed under Article II is similar to the Sweeney Report's proposal respecting liability for injuries to passengers. Certain differences, however, appear. The Sweeney Report would not impose liability where injury resulted in part from the passenger's wilful misconduct *or failure to observe certain regulations.* The O'Hara bill's proposal would avoid liability only where the passenger's wilful misconduct or *negligence contributed to the injury.*

Again the Sweeney Report states (page 404) that under the proposed standard of liability—

> "The injured passenger should be entitled to no compensation whenever the operator can show that the accident was due to *vis major* (Act of God) negligent act of a person not associated with the operator or to undetermined cause."

However, it may be urged that Section 1212 of the O'Hara bill would not fully cover the last point, i.e., it would not cover accidents due to undetermined causes. In other words, the air carrier, in order to show that the accident was not due to its failure to exercise the highest degree of care, would in reality have to explain how the accident happened in order to show that its happening was not in any way related to a failure of duty on its part.

It is intended that suit can be brought under the proposed aviation liability act in either a state or a federal court. In this respect the act is like the Federal Employers Liability Act.

Article III.

This article covers liability for the loss or

damage to baggage, personal effects, or goods or delay in their delivery. The carrier is liable unless it makes the same affirmative showing quoted above with respect to Article II. The liability with respect to baggage or personal effects is limited to $50 per passenger. The liability with respect to goods is limited to $50 per shipment of 100 pounds or less, or 50 cents per pound for any shipment of more than 100 pounds. The liability with respect to unreasonable delay in the delivery of baggage or goods is limited to such loss as might reasonably have been contemplated by the parties at the time the contract of carriage was made. The passengers or shippers are authorized to declare higher values than the liability limits specify and the carrier is authorized to establish additional charges for such declared values.

Article 19 of the Warsaw Convention imposes liability for "damage occasioned by delay." How far the courts would go in permitting recovery for delay is far from clear. O'Hara bill liability has been imposed only if the delay was unreasonable. This change has been made to reduce the likelihood of suits because of minor delays. The change brings the statute into line with the common law liability for delay by common carriers.

Section 1232 of this Article is also intended to make the operator liable except when the goods or baggage are shipped through an air express agency. In such case the air express agency and not the operator is made liable to the passenger or shipper. The proposed act is not intended to cover the matter of liability between the operator and the air express agency, it being contemplated that this matter would be handled by contract as is now the case between the Railway Express Agency and the air carriers.

Subsection (c) of Section 1234 of this Article embodies the maximum liability provisions now contained in the air express receipts used by the Railway Express Agency, which handles most of the air express in this country. These provisions have been used for several years and apparently have proved satisfactory.

Section 1236 of Article III authorizes the declaration of a higher maximum liability up to $250 per unit on baggage and $250 on personal effects with additional charges for such privileges to be made by the carrier in a tariff to be filed with the Board. This section corresponds with Article 22 of the Warsaw Convention and is generally in accord with the suggestions of the Sweeney Report.

Article IV.

This article is based upon the Rome Convention and has many counterparts in the Uniform Aviation Liability Act.

Section 1251 of Article IV confines the scope of the article to all bodily injuries, death to persons and damage to property on the surface of the earth caused by movement of aircraft or parts of aircraft operated by the carrier or the dropping of any object therefrom other than parachutes.

Section 1252 provides that the liability shall be absolute except that within an airport area the carrier shall be liable only upon proof of negligence.

Section 1253 provides that the carrier shall not be liable if contributory negligence was present, or if the injury or damage was the fault of a third person not an agent of the carrier except that the carrier shall have the burden of proving the fault of such third person.

Section 1255 provides that in the case of bodily injury, recovery shall not exceed $50,000; in case of death $10,000 except that the total recovery to any number of individuals arising out of any one accident shall not exceed $7 for each pound of the standard weight of the aircraft. In case of damage to property, it is provided that the recovery shall be in the amount of actual loss except that the total recovery is limited in the same manner as in case of death or personal injury.

The Rome Convention provides under similar circumstances, an overall limitation of 250 francs per kilogram but not less than 600,000 francs nor more than 2,000,000 francs.

Similarly, the Sweeney Report proposes a standard of absolute liability with respect to injuries to persons on the ground (not at an airport) "directly attributable to the operation of the aircraft." This rigorous standard is justified on the ground that "no convincing reason has been presented why it (civil aviation) should be subsidized at the expense of the luckless victim on the ground, who, without participating in aviation in any way, is injured by an aircraft accident not attributable to the fault of the operator."[8]

The Report also states that the imposition of liability without fault by legislation perhaps involves no departure from the common law as it is now developing. This statement

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[8]Id. p. 403, n. 7.

appears to be based upon the fact that in every reported case involving injuries to third persons or damage to property on the ground (other than at an airport), the aircraft operator has been held liable for the direct and consequential damages.

The Sweeney Report states that neither contributory negligence nor wilful misconduct *on the part of the person injured* should relieve the carrier of liability. If that is contemplated, the Sweeney proposal goes even beyond the already rigorous standards of the Rome Convention. Article 3 of the Rome Convention at least relieves the carrier of liability "where the negligence of the injured party caused the damage or contributed thereto."

Conclusion.

Generally, it may be stated that the O'Hara bill is in accord with the principles of the international conventions, the Sweeney Report, the Federal Aviation Liability Act and embodies some of the best features of the Uniform Aviation Liability Act.

If we assume that there is merit in the argument that claimants are confronted with practical difficulties in obtaining evidence as to the cause of aircraft accidents and the negligence of the operators, it can convincingly be urged that the appropriate solution is to impose upon the air carrier operators the duty of explaining the cause of the accident and of proving the absence of negligence on their part. That simple expedient would readily allow claimants with just claims to recover. From the viewpoint of the airlines, legislation not imposing too rigorous standards of liability and limiting recovery to reasonable amounts, particularly if effected by a federal act, might in turn be desirable. The entire subject, however, has many debateable aspects.

With respect to injury to persons and damage to property on the ground, the potential hazard is often increased due to the circumstances that airplanes are by and large compelled to take off and land at airports located near densely populated or industrialized sections of cities.

There is a considerable lack of uniformity in the standards of liability provided by state statutes where they may be applicable, and in states where no legislation is in force there is a similar lack of uniformity in the application of common law principles. We have also seen that there is a lack of uniformity as to the limits of recovery. Scheduled air carrier operations are essentially interstate. A federal act setting up standards of liability for the types of accidents mentioned here and limiting the amount of recovery might well do much to eliminate the existing diversities.

DISCUSSION

BY W. PERCY MCDONALD

Memphis, Tennessee

I HAVE been wondering how to explain an about face in my own thinking that has taken place in regard to one phase of aviation development.

I have always been a firm believer in States Rights.

When I first read certain provisions of the Lea Bill, I was alarmed at what I interpreted to be an invasion of States Rights.

I was wondering how to explain, this change of opinion, when I read where Mr. Patterson, President of the United Air Lines, recently said, "Current times and changing conditions prevent consistency." He was testifying at a Civil Aeronautics Board hearing where his prior testimony was evidently inconsistent with what he was then advocating.

A very careful analysis and study convinces me that air transportation is primarily a matter of national concern, should be entirely regulated by law, and regulations which are uniform throughout the country and that uniformity can only be had by national laws and regulations as distinguished from states laws and regulations.

I have had to overcome my own prejudices, due to what I have many times thought were encroachments by the Federal Government on States Rights.

I was appearing before a certain Public Service Commission objecting to their assuming jurisdiction of an intra-state air right application. I was interrupted by a member of the Commission who said, "If you think we ain't got jurisdiction, you stay around about five minutes and we are going to show you." He then added "that we are going to take jurisdiction of anything that flies from point to point and we do not care even if it is a snow bird."

I have recited a true happening.

Those of us who have followed the development of aviation regulation will recognize that different groups are proposing to set up rules regulating aviation that will not only be bur-

densome and expensive, but dangerous to air travel.

While I believe there should be uniform safety regulations, I do not want to be understood as saying that a State Department of Aeronautics does not have a definite job to do. I believe that it has.

The 1945 Legislatures of forty-four states will meet in regular session—Law makers are going to be asked to enact airport legislation. Much of this legislation will be incident to the location, establishment, maintenance, operation and financing of public airports, and legislators most constantly bear in mind the so-called three levels of government, to-wit: Federal, State and Municipal.

While it must be borne in mind the only two controlling powers, namely, the Federal Congress on one hand, and the legislatures of forty-eight states on the other, we must not forget that political subdivisions such as counties, towns and cities, may exercise only such powers as are delegated to them by the states where they are located.

Much thought must be given to this type of legislation.

Nationwide circulation is being given a Uniform State Air Carriers Bill. This Bill has been sponsored by groups of surface carriers who want to get into the aviation picture. Extensive hearings are taking place in Washington where steamship interests are asking to be allowed to get into Air Transportation.

I direct your attention to these legislative trends having in mind that you will carefully study them, and to the best of your ability make certain that nothing will be legislated that will handicap the advancement of air transportation. As attorneys, we are charged with this responsibility.

Aviation Insurance Liabilities; The Servicing of Claims

By George W. Orr

Director of Claims, United States Aircraft Insurance Group
New York, New York

AVIATION Insurance liabilities present an absorbing and challenging subject to the lawyer. This new and really marvelous form of transportation requires the application of the law to a new field of endeavor, involving the readjustment of legal maxims hundreds of years old. The enormous distances covered, passing state and international boundries almost in the twinkling of an eye, present most interesting and far reaching problems. But these are problems within the law, not problems that require the junking of the protection of our judicial procedure in favor of some legislative panacea.

Aviation Insurance liabilities are just the same as other insurance liabilities. The same types of coverage are written: Hull, accident and third party liability. The details of fact constituting the claims are different, but the remedy is the same. Aviation liabilities therefore boil down to the law involved. You gentlemen are experts in the law. About the only thing a short paper such as this can accomplish is to direct your thoughts to the law respecting liability in the light of my rather unique experience of more than 30 years as a member of the bar, quite half of which have been spent in active aviation operation and the handling of aviation claims. It is, therefore, not my purpose to expound the law but to discuss the law generally with respect to aviation. My object is to tear the veil of mystery from what many insist upon setting apart as a bewildering specialty with such peculiar requirements that our present civil law is inadequate.

There is no question as to the desirability of uniform nationwide safety and economic regulation of air transportation. This has already been accomplished by the Civil Aeronautics Act of 1938 as recognized through the Civil Aeronautics Board and the Civil Aeronautics Administration, which together now constitute the Civil Aeronautics Authority. It does not necessarily follow that this same centralization of control is required or even desirable with respect to liability.

Because flying apparently defies a natural law familiar to all—gravity—and is perhaps more spectacular than other forms of transportation, a cloak of mystery has gathered around it. And where there is mystery there is fear. This has been a distinct disadvantage to aviation, retarding its development. Many of us who entered the industry commercially found it necessary—when aviation first be-

came a business—to speak to every gathering that would hear us, Rotary and other civic clubs, schools, chambers of commerce, in an effort to persuade people that flying was not a death defying stunt, but a sound and scientific use of natural elements. While increased flying during the past fifteen years has proven its case, particularly to our youth, too much of mystery and fear remain to impede aviation progress.

Of course, flying does not defy nature; it uses nature. The principle which uses the air to bear the flying machine is as sound and definite and tangible as the principle that uses the water to bear a boat. This has been proven by the astounding record of safety in flying.

This same atmosphere of mystery and fear has affected the legal thinking of both lawyers and laymen. The idea has gained momentum that our courts of justice and the established law, which have taken other technical developments in stride, are incapable of giving adequate relief—that some special and radical legislation is necessary for aeronautical liabilities. As one who has handled more aviation claims, perhaps, than any other man, that has not been my experience. Nor is it the experience of the Committee on Aviation Law of the N. Y. State Bar Association, which reports: "Considering the success or failure of the common rules of liability by examination of the reported cases over the last thirteen years, there is little, if any, evidence to indicate that substantial injustice has been done as between operators by air and traveling or general public." Our courts have worked out problems of conflict, such as the difficult question of the rights in air space, with consideration and justice to all. But in so doing have preserved the protection of established judicial procedure to all, rather than having to apply the arbitrary rules of legislative enactment which cannot escape injustice in some circumstances.

My interest in this is not prejudiced by my insurance connections. Insurance underwriters can and will insure any risk the aviation industry is called upon to bear. That is simply a matter of rate structure. My great interest is aviation, of which I am a part. To set it apart from other industries or to use it as an entering wedge for the control of other industries, will, in my opinion, be detrimental to aviation.

This atmosphere of mystery extends to the law affecting aviation—as though there were some peculiar and highly specialized law involved—and some lawyers who get cases involving aviation are bewildered as to where to begin. Of course, there is no peculiar and highly specialized law involved — any more than in the case of any other technical industry. To date, we have very little statutory law affecting aviation. The common law rules of liability, with which every lawyer is familiar, apply as a general rule. True, one cannot thumb some code and get all the answers in ten minutes. That is why I say the subject is absorbing and challenging. But with intelligence and application, required in any other law suit, any competent lawyer can properly present his case.

The only statutory law presently affecting aviation liability is in those 24 states which have adopted the so-called "Uniform State Law for Aeronautics"—most of which include in their law a section imposing liability without fault for injury or damage to innocent third parties on the ground. Also, California has applied its guest statute to aviation. So the law of aviation is an open book to all who have the energy to seek.

Another mystery which should be dispelled is the mystery of how to find out what happened sufficiently to bring a suit when all aboard an airplane are killed. Let me say here that I know of no industry in which evidence upon which to bring a suit is more available. I can not recall a case, in the hundreds I have handled, that could not have been gotten to a jury on a question of fact. The operators are required to keep complete records of their operations. Various public agencies keep records pertaining to the operation. Usually a public hearing is held and always a report is published on serious accidents. Ability and energy are required, both for the plaintiff and defense, but there should be no mystery or no lack of information upon which to base a suit.

Conflict of law is another mystery that should be dispelled. We hear that the airplane is inherently interstate in character and therefore should be subject to uniform, rather than state liability law. The railroad, the bus, the truck, and according to some recent federal court decisions, almost everything entering into our modern life is interstate. There is no more reason for the liabilities of the airplane to be taken from the jurisdiction of the laws of the state over which it travels than these other operations. Among other disadvantages,

it subjects aviation to unfair competition with other forms of transportation. I have noted no conflict of liability law in connection with domestic aviation. We are simply guided by the law of the place of accident. There is no mystery here. The law of each state is available to all.

Of course, in international travel, where the entire system of law is different, and our airlines compete with other airlines subject to different law, uniformity is greatly needed and the Warsaw Convention, which applies to certain nations that have adhered to it, illustrates the value of such international treaties. Since my group has insured for many years the regularly established American international airlines and several foreign airlines, the international claims we have handled amount to about one in three of our serious claims. Unfortunately, the Warsaw Convention applies to only a few countries in this hemisphere—the United States, Mexico, Brazil and the European dependencies. Therefore, a large percentage of our international claims are subject to the conflict of different systems of law. Naturally, some tough legal questions arise, liability wise. For instance, some countries give only a right of action to their nationals, leaving the right of aliens to the law of their residence. Some American citizens, who have no right of action at common law for wrongful death, are given the right by the Death Act only for accidents within their state. Who would give a valid release, and if settlement is not agreed upon, under what law would suit be brought? Some amazing mixtures of nationalities, as well as national laws result from these international claims. In one case, a husband and wife, without children, residents of Equador, were killed in Peru. Their contract of transportation was entered into in Chile, the heir of the husband was a citizen of Holland residing in New Jersey and the heirs of the wife were citizens of the Argentine. Such a situation is surely a babble of laws. An international treaty providing uniform rules of liability and procedure with the countries with which we have air commerce would materially aid in the development of the expanded international air commerce that we anticipate.

The servicing of liability claims involving aviation is somewhat of a specialty. Aviation risks are generally underwritten by groups of casualty companies to better distribute the burden involved in risks of high value with the extremely limited distribution possible in a small industry. These companies have a wide and comprehensive system of claims offices throughout the United States, so local investigation and handling is available in this country. However, these very competent claims men are usually not familiar with aviation technically and do not have enough of this class of claims to specialize in aviation law. In foreign countries, legal and claims connections must be made and usually work under the same handicap of lack of experience.

The servicing of aviation claims, and particularly air transport claims, requires more cohesion in control than most other classes of claims, since the airplane travels great distances and carries passengers from the four corners of the earth. Even in a domestic accident, the factual investigation must be made at the location of the accident, whereas the claimants will have to be dealt with, perhaps in ten different states. Sometimes a single claim must be referred to several widely separated points.

After some ten years experience in the domestic and international field, my particular group, the United States Aircraft Insurance Group, decided seven years ago to establish a central claims office with jurisdiction over both domestic and foreign claims.

This central claims office is staffed with legal and technical specialists. All claims are funnelled through this one office, which gives an experience not possible when the handling of claims was distributed to several separate companies. The local claims office handling claims under the direction of this central office has the benefit of this collective experience as well as the specialized technical and legal assistance necessary in a field with which they are not familiar.

We have found that the collection of information in a central office has worked out quite advantageously to all concerned. This central office is in close personal touch with its airline assured and can convey its wishes and policies to the field. With all information centered there, it can be studied by specialists and referred to as many diferent localities as necessary, with instructions so complete that an office entirely unfamiliar with aviation can handle with understanding and dispatch. This centralized control is even more necessary in handling claims involving foreign accidents, where the claimants are in many different

nations and the laws of several countries must be fitted together.

Of course, this central claims office tries to be as familiar as possible with the laws of the foreign countries with which we have commerce. But the airplane can, and apparently does, go everywhere, and sometimes gets beyond the boundaries of any known legal system. But I find there is law of a sort everywhere. I recall an incident, amusing from a legal standpoint, in which one of our insured planes landed at a newly constructed airport in a wild section of Africa conquered only a few years ago. While standing on the ground the undercarriage retracted, permitting the plane to sink to the ground on several natives working about the plane, injuring or killing three. The natives are of course illiterate and there are no birth or other such records. There are no formal workmen's compensation or other laws. There are tribal laws, however, in which penalties are imposed for causing death or injury. These laws are administered by the tribal chief who judges the claim and the indemnity is distributed by him. In this case the chief considered the accident like one in which death was caused by the bite of a dog, in which case the master was assessed £30 damages. So we paid the 30 Egyptian pounds and everyone seemed satisfied.

The actual handling of aviation claims is little different from that of other classes of liability coverage. One curious attitude of some claimants is interesting. For some reason, they get the idea that if a person is killed or injured by an aeroplane, the damages should be greater than if injured by, say, an automobile. Perhaps this is because the airplane is considered in the luxury class. Certainly, I can find no basis in law for the distinction. Undoubtedly, the average settlement is higher, because the average air passenger is, up to the present, a bit above the average involved in automobile accidents, in earning and dependency.

The fashion now seems to be to see who can name the highest ad damnum. A few months ago one lawyer sued one of our insureds for $1,000,000. Not to be outdone, the next chap raised the ante and filed his suit for $1,110,000. Both claims, by the way, appeared to fall clearly within the limitation of about $8,300, provided by the Warsaw Convention.

Another assumption, particularly in the pleadings filed in aviation suits, is that a ticket for air transportation is a contract for the "safe transportation" of the passenger. While, of course, the air carrier is held to the exercise of the highest degree of care, as is any other common carrier, the well established law that a carrier is not an insurer of its passengers applies to air transportation as it does to any other.

It has only been possible to discuss the law involved in aviation liabilities in the most general terms. Perhaps a more specific development will be possible in the discussion to follow. However, aviation law will occupy an increasingly important place with the inevitable expansion of flying. If I have increased your interest in this subject, I will feel that this paper has served its purpose.

DISCUSSION

BY FORREST A. BETTS

Los Angeles, California

IN THE first place, I wish to take this opportunity—joining with Frank Marryott—in expressing my appreciation to Smythe Gambrell for the privilege of being on this program.

There is no doubt, as has been said, that the aviation industry, as related to the insurance and litigation field, as well as in its other more direct dimensions, is presently a giant which, even so, is small compared with its prospective size. The real problems of the aviation industry, as related to the activities of the law field, and particularly the insurance field, present a practically undented armor. To be a part of the Round Table discussions which will help develop the understanding of the profession on these problems, and to thus take part in an activity which should ultimately produce benefit both to us and to the aviation industry, is an honor.

The gentlemen who have preceded me have given a very lucid outline of the historical development of aviation and none of us should return to our practices without having a clearer understanding of the future by measuring the prospects against the history as thus given to us. I had thought, however, that probably Mr. Orr would favor all of you with a little more detailed description of the manner in which, as the outstanding claims attorney in this field, he succeeds in educating trial counsel about the country as they come under his guidance in the handling of claims in their

territories. I think it is not unfair to say that Mr. Orr is an expert "needler", with a background of information which permits him to take a helpful, albeit critical, position as the various steps of investigation and preparation for trial develop.

However, it is my feeling that there is no mystery involved in the processes of investigation and preparation of the defense against claims arising out of an airplane accident. In the main, I am making that statement referring to the personal injury claims which arise from commercial transportation. The correct description of what is necessary for proper preparation can be included in the one all important word "WORK". It is a different kind of work, perhaps, than is required in the automobile or other casualty case with which we are more familiar. In the majority of accidents few, if any, witnesses survive, and usually there is no member of the crew available after the accident to tell what occurred in the operation of the airplane. The dearth of witnesses, however, is greatly compensated for by the fact that, immediately upon the discovery of the wrecked plane, the Governmental authorities take charge of the wreck and the premises surrounding the same, as a result of which a very accurate establishment of the physical facts is possible. The inquisitorial hearing which is then held by the federal authorities is likewise of great help in bringing together all threads of information, so as to establish a very fine starting point for the investigation necessary to any defense.

In addition to the physical facts as established at the scene of the accident there have already been mentioned some other of the elements which are peculiar to this type of prospective litigation. For instance, the barograph —the use of which will probably eventually be required on all aircraft—and which is now universally used by commercial aircraft, is an instrument which gives a very accurate picture of what occurred at the field prior to and subsequent to the take-off on the flight in question. The barograph is ordinarily seated in the tail of the plane and usually is not destroyed, and thus the chart may be used as valuable evidence establishing the exercise of care on the part of the defendant aviation company—speaking of commercial transportation—in the checking of the airplane in its contact with the control tower prior to departure, and in the character of the flight thereafter.

For instance, in a case involving an accident which occurred in December, 1942, near the City of Fairfield, Utah, in which a Western Air Lines plane crashed—a case in which Mr. Orr is interested—the barograph establishes that the plane, which had been flown into Salt Lake from Los Angeles, and was on its return trip at the time the accident occurred, was properly tested at the Salt Lake field between the discharge of the incoming load and the time of its departure upon the outgoing trip. The barograph further establishes that following the take-off the plane, a Douglas DC3—made its regular scheduled ascent—that is, that for the time in miles traveled it had attained the correct gradual elevation and was at the altitude at which it should have been at the time the accident occurred. It is interesting also to note in this case that the accident began to occur at a time when the plane was traveling in its regular altitude of about 10,000 feet, at a place where there was not a mountain or obstruction of any kind within ten miles in one direction and fifteen miles in another. The plane had been observed to fly over the Fairfield airport within a few minutes before the crash occurred. It was a clear, cold night. One survivor was a lieutenant air pilot in the United States Marine Corps. From his testimony it would appear that something suddenly happened to the plane while it was otherwise on its normal course; that the engines speeded up momentarily, but the plane did not "stall", as that word is technically used; that the plane fell into a flat, skidding turn, in which it remained until it hit a comparatively flat plateau area.

I point these facts out to you because it brings up again the question of whether or not the doctrine of *res ipsa loquitur* should apply. It is my belief that the doctrine should not apply because it cannot be said that we have yet progressed in the field of aviation to that point where, if the highest degree of care is exercised, planes do not fall. On the contrary, it is my belief that, despite the excellent record of safety by commercial airplane companies in the transportation of passengers, we still must conclude that, even though the highest degree of care is used, there will occasionally be an airplane failure, resulting in injury to person, or damage to property, or both. It is perfectly true that in a large portion of the airplane cases wherein we have written decisions, the doctrine of *res ipsa loquitur* has been approved. However, there are two characteristics of those cases which should be noted. Either one or both exist in all of

the opinions which have fallen under by notice. In the first place, almost without exception, these cases deal with situations where the airplane has come into collision with some other object, either another airplane, a tree, or a mountain. It may readily be admitted that, under the peculiar facts of these cases, the doctrine was probably correctly applied; that is to say, it is conceivable that the court should hold that where the highest degree of care is exercised, pilots do not fly planes into the sides of mountains, and that when they do the facts speak for themselves, to the effect that the highest degree of care was not exercised. The second characteristic noted in these cases is that the courts often have predicated their decision upon the fact that the airplane companies are common carriers, without consideration of whether or not elements essential to the doctrine of *res ipsa loquitur* are present. They do not at all discuss the first essential element of the doctrine, namely, whether or not commercial aviation has reached that point of perfection where the exercise of the highest degree of care establishes *a fortiori* that there should be an absence of accidents.

Before leaving this discussion I think it behooves me—since the accident occurred in my section of the country—to add some explanation to the discussion of the $77,000 case in which the army bomber cut the tail off of an American Air Lines DC3 commercial transport, causing the commercial plane to crash, killing all of its occupants. In the first place, as is true concerning many people who use air transportation, the annual income of the deceased whose case was tried was proven beyond controversy to be $30,000 per year for at least ten years. He was a song writer of national repute, who had written many successful songs. The thing that is probably least understandable about the case is the decision to which the jury came. The case was tried before a judge who is a very fine gentleman, but who had only recently prior thereto come to the Superior Court Bench. He had spent a great many years in the administrative law field as Referee and Commissioner for the Industrial Accident Commission of the State of California. The problems involved were extremely complex, as a result of which a new trial was granted. The Court permitted the army bomber pilot to testify concerning a rendevouz made the night before the accident. It appeared that the army bomber pilot and the co-pilot of the commercial plane had commented upon the probability that they would both be in the neighborhood of Palm Springs or Indio, California, at about the same time and that, if such event occurred, they would salute one another in passing. There were many other things contributing, not only as an explanation of the verdict, but as an explanation of why the judgment had to be set aside and a new trial granted.

Going back to the question of investigation, there have been a considerable number of small accidents which are not those ordinarily thought of in discussing this subject. The mind ordinarily turns to large crash cases. There have been, and will continue to be, many cases involving minor injuries from which annoying litigation arises. For instance, about two years ago a claim arose concerning a woman who, in taking her seat in a plane ready to leave Los Angeles for Las Vegas, claimed that, in sitting down, she sprained her ankle. This at first seemed highly improbable, but we finally concluded that the hat box or other bundles which she was carrying came in contact with the little release button on the side of the seat in such a way that, as she seated herself, the chair relaxed into the reclining position, thus throwing her suddenly backward in such a manner that her foot caught in the footrest under the seat ahead of her, thus producing a rather severe ankle sprain. The stewardess was not "accident conscious", as are most employees of other common carriers, and, although the claim of injury was reported as the passenger left the plane at Las Vegas, no effort was made to ascertain whether or not there were available, among the passengers, witnesses to the alleged accident. Therefore, when it became necessary to ascertain what had happened, we found an almost insurmountable difficulty occasioned by the widespread location of the witnesses about the country. This geographic distribution, plus the fact that employees have not as yet been taught to secure the names of witnesses—even though the injury appears to be slight—causes a great deal of expense, because each passenger on the passenger list must be separately interviewed. Since the incident was not called to their attention at the time, even those who have some "recollection" that there was an accident, are unable to give accurate details such as are desirable to truly evaluate the claim.

There are a great many other interesting problems and cases which are arising from aviation, and particularly commercial air trav-

el, and there will be a great many more.

However, it is long past the time for the termination of this Round Table, and I will not presume on your good nature to hold you longer. I merely would like to reiterate the statement made earlier in my discussion, that in the investigation and preparation of cases involving airplane crashes, one is faced with the necessity of doing a very great amount of exacting work.

Report of the Practice and Procedure Committee

WILBUR E. BENOY, *Chairman*

YOUR committee on Practice and Procedure has been engaged in the study of the Rules of Civil Procedure for five years last past. The last two years of such study were spent with particular reference to the advisability and necessity of amending and supplementing each of the rules. During that time, the Advisory Committee on Rules for Civil Procedure in the District Courts, appointed by the Supreme Court of the United States, has been engaged in a study relative to revision of the rules. The preliminary draft of proposed amendments to the rules was printed and released on May 15, 1944, and reached the chairman of your committee on the 22nd day of June, 1944. Copies were immediately distributed by the chairman to members of the committee with an assignment to each member of the committee of certain designated rules for particular study.

As the result of that study, your committee recommends the following disagreement with respect to the proposed amendments by the Advisory Committee and suggestions with respect to amendments and additions to certain of the rules with respect to which no recommendation has been made by the Advisory Committee. The members are referred to the preliminary draft of the proposed amendments, a copy of which may be obtained by addressing Advisory Committee on Rules for Civil Procedure, Supreme Court of the United States Building, Washington 13, D. C.

A number of the amendments, proposed by the Advisory Committee, are for clarification purposes only. Other of the rules have been changed with respect to content in several important respects. The Advisory Committee itself appears to have been divided on the amendments to several of the rules, has submitted alternative proposals and has asked the Bar for recommendations as to which of the alternates should be adopted.

Your committee recommends:

GENERAL RECOMMENDATION

While the Advisory Committee has had the proposed amendments under consideration for two years, its printed preliminary drafts were not available until the last of June, 1944. It is the judgment of the committee that sufficient time has not been afforded lawyers and judges for a study of the rules. It has been the announced intention of the committee to refer the proposed amendments to the Supreme Court at an early date so that they can be filed with Congress on or before the opening day of its session in 1945. We recommend that the reference by the Advisory Committee to the Supreme Court be withheld until sufficient opportunity has been given to consider, before adoption, the proposed amendments and that the Advisory Committee consider additional proposed amendments to certain of the rules hereafter referred to.

It is the direction of the committee that the chairman refer copies of this report to the Advisory Committee and each member thereof.

RULE 6

TIME

Your committee, in its report for 1943,[1] recommended an amendment to this rule so as to remove the possibility of recurrence of the harsh results indicated in *Orange Theatre Corporation v. Amusement Corp.*, 130 F. (2d) 185. Your committee's suggested amendment has been taken care of in the proposed amendments to Rule 12.

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[1]Proceedings of the Insurance Section of the American Bar Association at Chicago Meeting in 1943, pp. 377 et seq.

Insurance Counsel Journal for July, 1943, Vol X, No. 3, p. 66.

(The reports of the Committees on Practice and Procedure of both the Insurance Section of the American Bar Association and the International Association of Insurance Counsel for both the years 1943 and 1944 are identical.)

The committee recommends Alternative 3, p. 3.[2]

RULE 12

DEFENSES AND OBJECTIONS, ETC.

Your committee approves Alternative 1, p. 10.

Your committee proposes an addition at page 13, line 112, to Alternative 1, or to such other Alternative as may be adopted, as follows:

"No pleadings containing redundant, immaterial, impertinent or scandalous matter shall be read or submitted to the jury, either as a part of the charge or otherwise, whether or not a motion to strike such matter has been filed or passed upon."

RULE 14

THIRD PARTY PRACTICE

The committee disapproves of the proposed amendment. The matters of venue and jurisdiction are not clarified and the questions will recur under the proposed amendment, as to whether or not the third party defendant may be brought into the case if he be not found within the jurisdiction of the court or is subject to the court's jurisdiction if an independent action were brought. The same disagreements with reference to "ancillary jurisdiction" are possible as under the present Rule.[3]

As proposed, the Rule would give promise of bringing into a plaintiff's case, in lines 24 to 28, issues which ought not to be presented as against him. We recommend, in order to maintain the status in tort actions in those states where contribution in tort exists and wherein a defendant is given, by local law, the right to vouch in other joint tort-feasors, and, in order to maintain rights arising in contract cases, the following amended Rule 14 in lieu of both the original and the proposed amendment:

"RULE 14—*Parties Jointly or Concurrently Liable.* Before the service of his answer, a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave to bring in and make a co-defendant any person or persons who may be jointly or concurrently liable in tort to the plaintiff or as against whom the defendant may have a right of contribution, and any person who may, on contract, be jointly or severally liable or as against whom a defendant has the right of contribution on contract. If the motion is granted and the summons and complaint are served, the person so served shall be known as a co-defendant and shall make his defenses as to such claim as provided in Rule 12 and his counter claims and cross claims against the defendant as provided in Rule 13. The co-defendant may assert against the plaintiff any defenses which the defendant has to the plaintiff's claim."

In the event it is determined to adopt the proposed revision, we suggest:

(1) Clarification of the question of jurisdiction by amendment as follows: Change the period in line 8, page 27, to a comma, and add:

"provided that such person, not a party to the action, may be found within the jurisdiction of the court and an independent action brought against him by the defendant would be cognizable in the district in which such action is filed."

(2) In lines 7 and 8 and 41 and 42, "who is or may be liable to him", is indefinite. Does this mean primarily liable, secondarily liable, contingently liable or conditionally liable? The phraseology should be made clear so that it may be determined who can or cannot be brought within the confines of the rule.

RULE 30

DEPOSITIONS UPON ORAL EXAMINATION

In our report to the Association in 1943, we pointed out several defects in the existing Rules, particularly Rule 34. This defect was the result of constructions of the Rule which permitted a court to order produced, for inspection and for copying, confidential investigation files procured by a party or his attorney in connection with his investigation of

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[2]All such references are to the Preliminary Draft of the Proposed Amendments, published by the Advisory Committee of the Supreme Court in May, 1944.

[3]See addresses of Alexander Holtzoff, Report of Proceedings of Section of Insurance Law, American Bar Association, Detroit Meeting in 1942, p. 265.

Address of L. J. Carey, the same report and meeting, p. 272.

Address of George J. Cooper, Report of Proceedings, Section of Insurance Law, American Bar Association, Chicago Meeting for 1943, p. 291.

Address by Lon Hocker, Jr., Insurance Counsel Journal, October, 1943, Vol X, No. 4, p. 43.

Address by Robert P. Hobson, Insurance Counsel Journal, October, 1943, Vol. X, No. 4, p. 45.

Address by John A. Kluwin, Insurance Counsel Journal, October, 1941, Vol VIII, No. 4, p. 35.

a claim and preparation for the trial of an action. Other courts took the opposite view. This matter was given extensive consideration and several very comprehensive papers were prepared in connection therewith.

The proposed amendments to Rule 34, refer to the "applicable protective orders mentioned in Rule 30(b)" and the protection accorded is with respect to both the discovery and production of documents under Rule 34 and depositions upon oral examination under Rule 30.

The protective orders referred to (page 43, lines 14 to 17) provide that the court may limit both the inspection of documents and the taking of depositions on oral examination so that:

"* * * certain matters shall not be inquired into, or that the scope of examinations shall be limited to certain matters, *or that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial* * * *" (New matter proposed is in italics.)

This proposal does not offer the correction which the committee sought. This proposal leaves it to the discretion, arbitrary or otherwise, of a District Court as to whether statements of witnesses and medical reports of examinations of the parties, and other investigation procured, and preparations for trial be ordered disclosed to the opposing side. This new matter in Rule 30 also ties in with the new matter in Rule 33, Interrogatories to Parties.

The proposed amendment to Rule 30 does not, most decisively, cover the amendments sought by the committee to Rule 34. The proposed rule invites an extension of the construction given Rule 34 by a few courts; and invites an extension of fraud and perjury in an effort to avoid the effect of statements which may be so ordered to be disclosed.

Rule 34

DISCOVERY AND PRODUCTION OF DOCUMENTS, ETC.

(A) In order to properly give the necessary relief, we suggest the deletion of lines 11 and 12, page 48, of the proposed rule and the insertion, after the word "control", in the 14th line, the following:

"provided the same would be legally admissible in evidence in the action for any purpose other than solely as an admission or as an impeachment of the witness, and"

At the conclusion of line 24, insert another paragraph reading as follows:

"The term 'privileged', as used in this rule, shall be deemed to include the results of any investigation made by any party to an action or anyone on his behalf, for the purpose of ascertaining any facts material to said action or for the purpose of preparation for trial thereof; and shall also be deemed to include any communication between any party or his agent, and the attorney for such party."[4]

(B) Autopsy. No provision is made in any of the rules for an autopsy where, by substantive law, a party is entitled to the same. An insurance company entitled, by contract, to autopsy is now required to go into a state court to enforce such right even though an action on the policy be pending in a Federal Court. The following addition to Rule 34 is suggested in order to cure the defect:

In line 22, page 48, change the period to a semi-colon and insert before the last sentence contained in the proposed revision, the following:

"or (3) order any party to permit the disinterment, dissection of any human body and the chemical, microscopical and bacteriological examination of said body and the removal of any tissue or organ of said body for examination and study for the purpose of discovering the exact cause of death of said deceased person and preserving all evidence secured as a result of the above."

While no suggestions for amendment to Rule 35, Physical and Mental Examination of Persons, have been made, the above suggested rule might be attached to existing Rule 35 as paragraph (3).

Rule 49

SPECIAL VERDICTS AND INTERROGATORIES

In our report to the last annual meeting of

[4] See address of Charles E. Pledger, Jr., Report of Proceedings of Section of Insurance Law, Philadelphia Meeting for 1940, p. 226.

Address of Martin Conboy, Report of Proceedings, Section of Insurance Law, The American Bar Association, Indianapolis Meeting for 1941, p. 144.

Address of Walter O. Schell, Report of Proceedings, Section of Insurance Law of American Bar Association at the Detroit Meeting, for 1943, p. 278.

this body,[5] we called attention to the fact that Rule 49(b) provides that the court "may" submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict."[6]

We recommend that the word "may", in this connection, be changed to "shall". The purpose of interrogatories, in connection with a general verdict, is to give to either party the right to demand, uninfluenced by the action of the court, an answer upon a controlling issue of fact without regard to the general verdict. For a court to deny the right to submit interrogatories on controlling issues of fact to a jury when a general verdict is rendered, amounts to denying the due process of law, since the jury is the sole judges of the facts and may, and often do, misapply the court's instructions as to the law. We suggest the following amendment to Rule 49(b):

"The court, *upon its own motion may or upon request of a party, shall* submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon controlling issues of fact, the decision of which is necessary to a verdict."

Rule 50

MOTION FOR A DIRECTED VERDICT: AND FOR JUDGMENT

This Rule gives a party the right, at the close of all the evidence, to move to have the verdict and any judgment entered thereon, set aside and to have judgment entered in accordance with his motion made during the trial for a directed verdict. The procedure is then prescribed as to what shall happen in connection with that motion. The rule then provides (lines 29 to 34):

"If, after verdict, a party *does not make* a motion for judgment, the court's failure within twenty days after the return of the verdict to order judgment in conformity with the motion for a directed verdict is equivalent of a denial of a motion for a directed verdict and of a motion for judgment."

The latter quoted section appears to be entirely inconsistent with the former and we suggest the substitution in lieu thereof the following:

"If no motion is filed by the party for judgment within ten days after the close of all the evidence, such party shall be deemed to have abandoned his right to file such motion."

Even if the non-conformist portion of the section is retained, it certainly should be reworded as it is not in accordance with justice to provide that the inaction of a court on any matter before it for decision should be considered a judgment for or against either party.

Rule 52

FINDINGS BY THE COURT

Lines 20 to 21, page 58, require findings of facts to be filed contemporaneously with the memorandum or opinion of the court.

This is an unworkable provision, inasmuch as the Federal Courts have found it convenient, if not necessary, to refer the preparation of findings of facts and conclusions of law to counsel for the prevailing party, giving the losing party an opportunity to either criticize the findings prepared by counsel for the prevailing party or propose counter findings. The provision will be evaded by the courts by failing to "file" the opinion or memorandum until the matter of preparation of findings of facts and conclusions of law are referred to counsel in this manner. No rule should be enacted when it may be readily seen in advance that its violation will be more frequent than its observance.

Rule 54

JUDGMENTS: COSTS

The proposed amendment seems inadequate and we suggest that in line 22 the period be changed to a semi-colon and the following new matter be immediately inserted:

"in the entry of any order or orders or other form or forms of decision, however designated, as to one or more or all of such claims before entry of a judgment or judgments adjudicating all such claims shall not terminate the action as to any such claims; and such order or orders, decision or decisions shall be subject to revision at any time prior to the entry of a judgment or judgments adjudicating all such claims."

Rule 56

SUMMARY JUDGMENT

The proposed amendment is disapproved. In lines 12 and 13, page 66, it is provided

[5] See footnote 1.

[6] See address of Wilbur E. Benoy, Insurance Counsel Journal, October 1941, Vol. VIII, No. 4, p. 21.

that the plaintiff, or a cross petitioner, *at any time after* the commencement of the action, may move for summary judgment. This rule is manifestly unfair to a defendant. It gives the opportunity, before the filing of an answer is required and before counsel may become sufficiently acquainted with a complicated case, to immediately move for summary judgment in his favor. He may have secured, in advance of the filing of the suit, all the affidavits he needs. Ten days is not "ample" time. The court may or may not protect him, depending upon the particular attitude, whims and caprices of the particular judge presiding.

The suggested change made "in the interests of more expeditious litigation" may, if the change is made, be at the expense of justice to the defendant litigant. The defendant should, at least, have opportunity, for the preparation of his case, the same length of time as he is entitled to prepare and file his answer. In our judgment, the rule needs no amendment. The court has full power to protect against delays by speedily passing upon any motions which may be filed.

Rule 58

ENTRY OF JUDGMENT

Your committee, in its annual report submitted in 1943,[1] also recommended that this rule be so amended as to provide for the entry of judgment only after motions, whether for new trial, for judgment on the evidence, or otherwise, be disposed of, so that when one desires to take an appeal he will not be embarassed and hampered by questions not disposed of. Its results are well illustrated in the case of *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203.

We are not unmindful of the line of cases construing 28 USCA, §230, holding that the seasonable filing of a motion for new trial, or a motion to vacate, amend or modify a judgment seasonably made, tolls the time for filing an appeal until such motions are disposed of. That construction rests upon a construction of the statute providing that the application for appeal must be made within three months "after the entry of such judgment or decree". The construction is quite liberal and, in view of the intervention of the rules, may be modified at any time. Precedents are being daily upset. The rule should be specific and the rights of litigants should not depend upon construction.

[1]See footnote 1.

We submit that all questions should be disposed of before the final judgment is entered.

We recognize that a change in this rule will require extensive changes in other rules but now is a better time to do it than later.

Rule 59

NEW TRIALS

Rule 59(a) should specify, both in actions at law and suits in equity, the causes for which a new trial may be granted.

Rule 71-A

CONDEMNATION OF THE PROPERTY FOR PUBLIC USE

The rule is disapproved by this committee. It fails to provide due process to owners of property and lein holders therein. The right to appropriate and the time when property may be possessed is, of course, fixed by statute. The rule requires no more than "one of the owners or parties in interest" to be named as defendants even though numerous parcels or tracts of land be included in the same proceeding; it requires no showing on the part of the condemner as to any efforts to locate parties who may be designated as "Unknown Owners"; it attempts to permit service by publication upon such "Unknown Owners"; it purports to preclude such unknown owners from raising any question as to the value of the property in the event they do not appear and defend; it authorizes such procedure without notifying mortgagor or other lein holders who may or may not be notified by the record title owner, assuming that he be made a party, permitting such property to be disposed of without notice to the lien holder at less than the amount of his lien; it provides for the required answer within twenty days even as against those who may not have received the notice and for default judgment if they do not appear within twenty days.

The foregoing defects and objections appear upon the face of the rule. The committee has not had the time to investigate the validity of claims made by proponents of the rule nor objections made by opponents to it, of which there appear to be many. The patent defects and insufficiencies appearing upon the face of the rule indicate that the rule should not be approved in its present form.

RULE 73

APPEAL TO A CIRCUIT COURT OF APPEALS

The Alternative Rule, page 96, is approved by this Committee.

RULE 77

DISTRICT COURTS AND CLERKS

Lines 2 to 4 are disapproved for the reasons noted under Rule 58. This Rule should be amended by eliminating lines 2 to 4 inclusive, and substituting in place thereof:

"The time to appeal shall start with the entry of a judgment, unless a motion to vacate and set aside the judgment or for a new trial be filed within the time provided by Rule 59(b), in which event the time to appeal shall start from the entry of the order overruling such motions."

The inclusion of this matter into the rule, whether the procedure discussed under Rule 58 be adopted or not, makes specific the time at which the appeal begins to run. It adopts the procedure specifically approved by the Supreme Court in *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203. The adoption of this suggestion together with the construction of 28 USCA, §230, by the Supreme Court and Circuit Courts of Appeal, referred to in Note 3 of that decision, will make certain when the time for appeal begins to run.

The Alternative Rule proposed at page 108 is disapproved.

Respectfully submitted,
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MORRIS E. WHITE, Tampa, Fla.
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WAYNE E. STICHTER, Toledo, Ohio
BENNETT O. KNUDSON, Albert Lea, Minn.
JOSEPH H. HINSHAW, Chicago, Ill.
CLARENCE W. HEYL, *Ex-Officio*
Peoria, Ill.

OPEN FORUM

Practice and Procedure

Chairman: WILBUR E. BENOY, *Attorney, 2910 A.I.U. Citadel, Columbus, Ohio*

DISCUSSION LEADERS

J. H. HINSHAW, *Attorney, Chicago, Ill.*

WAYNE E. STICHTER, *Attorney, Toledo, Ohio*

G. L. REEVES, *Attorney, Tampa, Fla.*

JOHN D. RANDALL, *Attorney, Cedar Rapids, Iowa*

BENNETT O. KNUDSON, *Attorney Albert Lea, Minn.*

A meeting of the Practice and Procedure Committee of the International Association of Insurance Counsel was called to order at the Edgewater Beach Hotel, Chicago, Illinois, Friday afternoon, September 8, 1944, at 2:20 p.m., Mr. Wilbur E. Benoy, presiding.

CHAIRMAN BENOY: Gentlemen, we are going to proceed.

Our first address that was set on the program was the Proposed Amendments to Rule 14. Mr. Cooper has been disabled this summer and he wrote me after the program was printed that he was going to be unable to be here. So we have a substitute on that rule.

I think we will proceed with Rule 34, which I have asked Mr. Hinshaw to discuss and which he is now prepared to do. If you care to proceed, Mr. Hinshaw, we will be glad to listen to you.

(Thereupon Mr. J. H. Hinshaw of Chicago, Mr. Wayne Stitcher of Toledo and Mr. W. E. Benoy of Columbus, read papers which are reproduced elsewhere in this issue, after which the Round Table was opened up for a discussion of various of the Rules and the discussion proceeded.)

CHAIRMAN BENOY: There are five different rules here which the Committee has selected as worthy of your attention. The first will be Rule 34, and I will ask Mr. Hinshaw to conduct that discussion.

(Discussion by Mr. Hinshaw, page 45.)

MR. HINSHAW: Gentlemen, you have heard my discussion. If anybody else wants to talk about it, I will be glad to hear from them.

MEMBER: Mr. Hinshaw, in the four cases you discussed, was it not held in at least one, if not more, of those cases that, where the statements were taken either by counsel or under the direction of counsel, they were in fact private communications and could not be required to be produced?

MR. HINSHAW: In the four cases I referred to, that is true.

MEMBER: That was the holding in each one.

MR. HINSHAW: That is substantially the holding in each one of the four.

MEMBER: Why cannot it be said this one case is completely out of harmony with the others? Our courts in south Texas are not following that.

MR. HINSHAW: I am sorry that I don't practice in Texas. The trouble is that in our district they are holding it the other way. That is what makes me interested.

MEMBER: Mr. Hinshaw, in the district court of the western part of Virginia, in a case which I was defending for the Norfolk & Western Railway, the court entered an order that required that the records and all information and data, including statements of witnesses, be made available for the plaintiff. Now it so happened in that particular case, it was a rule of the railroad, that the preliminary statements are taken by an employee. For instance, in this case the statements were taken by a trainman, who was thoroughly untrained in the taking of statements. Many times those statements would be inaccurate, as you would expect, taken by an untrained person. Well, now, we were confronted with a pretty serious situation. It so happened, that the case was disposed of by a certain motion before we had to actually disclose it. But if the opposing counsel had pursued it, it might have been a matter of very serious consequences. I rather thought at the time that the judge was wrong in the extent to which he went. But certainly in that case he entered an order which would have opened up our files as far as the railroad, in this particular case, was concerned, which was something far from what we desired to do.

I was interested in your statement there. For instance, one of the safeguards is that you can use now statements of witnesses to contradict those witnesses when they testify. Whereas, if you permit them to read those statements before trial they can make certain adjustments.

CHAIRMAN BENOY: Are there any further questions you want to ask Mr. Hinshaw? If not, we will go to Rule 56, Mr. Stichter. He will take charge of any questions you wish to ask of him.

(Discussion by Mr. Stichter, page 47.)

MR. STICHTER: Are there any questions about the proposed amendments to Rule 56 on Summary Judgments?

CHAIRMAN BENOY: I would like to ask one. What is a summary judgment? The case you illustrated wasn't very summary.

MR. STICHTER: Well, the rule says, "A person may file notice for summary judgment with or without supporting affidavits." The court then will examine the pleadings, depositions, any admissions on file and the affidavits of any that have been filed in support of the motion for summary judgment or opposed to the motion for summary judgment and if on consideration of all of those he is of the opinion there is no genuine issue as to any material fact in the case, he can render judgment in favor of the moving party. The matters to be considered by the court are very similar to what a court would consider on a motion for a directed verdict, except, of course, that he may consider the pleadings that are on file and affidavits which are, of course, not evidence. But if a person would be entitled to a directed verdict in his favor upon the close of a case, then have that same evidence appear in his depositions or in his affidavits, he would be entitled to summary judgment. The summary judgment process is to enable the court to render the judgment summarily where the facts are not genuinely in dispute and that appears upon the record consisting of the pleadings, depositions and affidavits.

MEMBER: Does that apply to an unliquidated claim as well as to a liquidated?

MR. STICHTER: Yes. Now the courts have rendered summary judgment in cases in which the pleadings filed make an issue, where the court can determine from depositions and affidavits on file that the issue tendered by the pleadings is not a real issue, is not bona fide, and can render summary judgment if they find there really is no genuine issue, although there may appear to be one from the

pleadings. That, of course, is discussing generally the rule on summary judgments and we are more interested in the question of these proposed amendments as to the rule on summary judgments.

Are there further questions?

CHAIRMAN BENOY: What appears to be the necessity for the amendments that are proposed?

MR. STICHTER: Well, the Advisory Committee said in the notes that the first amendment is to give the plaintiff the same right that the defendant has. The defendant has the right under subdivision (b) of the rule to file motion for the summary judgment at any time while the plaintiff under the rule has the right to file motion for summary judgment only after an answer has been filed. As the Advisory Committee said, there are cases in which the defendant files dilatory motions and weeks and months may elapse before he files his answer and the plaintiff sits by helpless to file a motion for summary judgment.

MEMBER: Is there any other remedy to that?

MR. STICHTER: I think there is. The court may deal with motions which are not bona fide. If the answer isn't filed promptly because the motion is well taken and granted, why there should be that delay. It is no fault of the defendant.

MR. HINSHAW: Isn't that an indictment of the court more than anything else? If the court thinks the delay isn't proper, he has the authority to stop it.

MR. STICHTER: But to compel the defendant to come in and show within ten days that he has defense whereas the rules give him 20 days in which to prepare a formal answer is certainly working a great injustice upon the defendant. Under the proposed rule the plaintiff can file a complaint and with his complaint file a petition for summary judgment and set down a hearing for ten days and the judge may or may not postpone the hearing. He has the right under subdivision (f) to grant a continuance but he doesn't have to. Witnesses may be in distant parts of the country. It would probably take the lawyer ten days in many of the cases to find out what it is all about, let alone being prepared to come in with affidavits and depositions to prove that he has a real defense.

MEMBER: Shouldn't the court be able to protect the defendant from undue hardship in such a case and wouldn't it be reasonable to anticipate in most situations that the court would protect the defendant from undue hardship?

MR. STICHTER: I think it is reasonable to suppose that in most cases the court would protect the defendant from undue hardship but there are a minority of cases in which the defendant is going to suffer.

MR. HINSHAW: Mr. Chairman, I think that counsel's answer just turned the other way round is the complete answer to that—wouldn't the court protect the plaintiff from undue hardship? He has twenty days, if he doesn't put up his answer he can give a judgment if he wants to. He doesn't have to allow delays and delays if he doesn't want to or if they are not proper.

CHAIRMAN BENOY: Are there any more questions on this rule? If not, we are closing the session on that.

Now as to Rule 14, Third Party Defendant, or Third Party Plaintiff, is there any discussion on that?

(Discussion by Mr. Benoy, page 43.)

MEMBER: I think you mentioned the matter of trying these cases to a jury, and suppose you have a third party defendant brought in. You have no equitable issues at all, nothing but law questions. How complicated does that have to come before the right to jury trial goes out the window?

CHAIRMAN BENOY: I don't say that it does go out the window.

MEMBER: No matter how complicated that would become?

CHAIRMAN BENOY: That is right. How could you take that away under the Constitution?

MEMBER: I think there was a common law rule that where you had multiple parties to a certain extent, that it became an equity case.

CHAIRMAN BENOY: I haven't an illustration to give you on it one way or the other. Has anybody else an answer to that query?

MEMBER: If the issues became unduly complicated, wouldn't it become impossible for the court to grant separate trial as to separate issues and handle the matter of complication of issues by separate trials?

CHAIRMAN BENOY: Mr. Hinshaw has the discussion in answer to your question.

MR. HINSHAW: The court has the right to grant severance on proper motion. He can separate them if he wants to. If he doesn't

want to, then you are up against it. It is not granted under Rule 14 but there is another rule under which that is taken care of.

Are there any other questions? Have any of you had any experience following this third party practice?

MR. STICHTER: I have had it brought in on me.

CHAIRMAN BENOY: With what result?

MR. STICHTER: I got my party dismissed.

CHAIRMAN BENOY: Has anyone else had it? What have you found out, Van Alsburg?

MR. VAN ALSBURG: It worked out all right in that case.

CHAIRMAN BENOY: You brought it in?

MR. VAN ALSBURG: Yes. We had quite a dispute on it originally on the question of whether it involved the same accident—it happened to be accident case—or whether there were separate accidents, but the court considered it as one and permitted the other to be added.

MR. STICHTER: Mr. Benoy, I had a case in which a passenger in a truck was seriously injured in a collision with an automobile and the passenger brought suit against the driver of the automobile and the driver of the other car tried to bring in the truck operator and tried to force the truck company onto the plaintiff as the defendant. In our state, Ohio, there is no contribution between joint tort feasance. For that reason, I was able to have my defendant dismissed from the case because the plaintiff didn't seem to be at all interested in pursuing my defendant and the court held that the defendant had no right to force another defendant upon the plaintiff.

MEMBER: In an Iowa case, where the plaintiff sued the driver of the car in which he was riding, which involved the guest statute, of course, and the driver of the other car, the Supreme Court granted separate trials for the reason that the issues were different and they didn't allow them to be tried together.

CHAIRMAN BENOY: That is a state case. Did you have the same rule out there as this rule?

MEMBER: Now they have adopted new rules in Iowa to allow bringing them in. I don't know whether the new rules would change that or not. They said definitely in that case they couldn't sue both in the same action because the issues were different, and they granted separate trials.

MEMBER: Judge Scott in the Federal Court held the other way before that decision.

MEMBER: Now the new Iowa rules they have adopted, if that makes any difference, I don't know. That is the trouble, they are always changing things to make them complicated for us.

MR. HINSHAW: I might state an experience we had where the plaintiff sued our client and we defended it and asked leave to make another party defendant and to enter a counter-claim. So that A sued B, our client, and B sued C. A wasn't interested in C because he was a friend of his. But we were entitled to have the damages decided in the same action because the action was the same all the way through and the jury couldn't give a verdict against B because they thought B had a good cause of action against C. They found us not guilty because they thought we had a good claim against C.

CHAIRMAN BENOY: Any further questions? If not, let's pass on to the next one.

The next is Rules 58 and 77. They didn't revise Rule 58 but they did revise Rule 77.

MR. STICHTER: The only proposed change to Rule 58 regarding entry of judgment is in the sentence reading, "When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith." The proposal is to amend that by striking out the words "the entry of a judgment," and the words, "there be no recovery," and the insertion of the words, instead of "there be no recovery," the words, "all relief be denied." So that sentence would read: "When the court directs that a party recover only money or costs or that all relief be denied, the clerks shall enter judgment."

In this case, the court doesn't direct the entry of a judgment. He just simply directs that the party recover money or costs, that all relief be denied and the clerk shall enter judgment forthwith. This is a case, you see, where the relief prayed for may not ask for recovery of anything, so it is thought advisable to strike out the words, "there be no recovery," and in lieu thereof say, "all relief be denied."

Then there is this further change. They propose another sentence to be added to the

bottom of Rule 58—"The entry of the judgment shall not be delayed for the taxing of cost." That would not seem to be of any great importance.

CHAIRMAN BENOY: The one we are directing our attention to is this, "Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk."

MR. STICHTER: There is no proposed change in that. It is automatic and the time of appeal runs from that instant. The Committee is recommending that those rules be revised so that the time for appeal run after motion for new trial or motion for judgment is over-ruled, so as to get all questions disposed of before the time for appeal expires. That is the practice that we have in Ohio and it has worked very fine. Here the rules specifically recognize motions for new trials, motions for judgment notwithstanding the verdict, and several other character of judgments, but that rule clamps down on you and says that the court may take any old time that he wants to dispose of your motions, but the time of your appeal runs from the date of the verdict, unless the court otherwise directs.

CHAIRMAN BENOY: No, sir, it runs absolutely. That is, where your verdict is entered, where you have a verdict by the jury. Of course, there is an exception to it. You mean unless the court otherwise directs?

MR. STICHTER: Yes.

MEMBER: I think there has been a decision on that by the Supreme Court to the effect that rule must be read with the general rules as to appeals and the time begins to run after the court passes upon the motion for due trial.

CHAIRMAN BENOY: That is the Leischman case? That is the case that Mr. Hocker tried and discussed here last year.

MEMBER: I remember that discussion, too, and I found a case to that effect.

CHAIRMAN BENOY: I wish you would supply it if you can. In other words, it is up to the discretion of the court whether or not he will hold up judgment upon the verdict of the jury.

MR. STICHTER: Rule 77 reads that "the time for appeal shall start from the entry of a judgment." That is a proposed rule, amendment to 77.

MEMBER: Read that rule again. As I recall it, the decision that had to be construed along with the general right of appeal provided for 90 days.

MEMBER: Mr. Benoy, in that same connection, we have a local rule under which our clerk is prohibited from entering judgments. Right of entry of judgment is reserved by the court and the court has uniformly entered judgment in all instances. Sometimes he delays several days after the verdict is entered before judgment is entered.

CHAIRMAN BENOY: It is his mandatory duty to enter the judgment as soon as the verdict comes in.

MR. STICHTER: Unless the court otherwise directs.

MR. HINSHAW: That rule is correct.

CHAIRMAN BENOY: Suppose he doesn't direct that, which is not in his assumption at all?

MR. STICHTER: He has a local rule. The court adheres to the local rule and that is otherwise directing, don't you think?

CHAIRMAN BENOY: Is that Federal practice or state practice?

MEMBER: That is in the Federal practice.

CHAIRMAN BENOY: In other words, it is illustrative of what we have run into in this whole study, that you may have one practice in one jurisdiction and another in another. So if we are going to have rules for direction of the Federal court, let's have them all alike. Isn't that correct?

MR. STICHTER: It would certainly seem to be very advisable to delay entry of judgment until motion of new trial is passed upon. I have had no adverse experience myself with it but I know the possibilities there and it was demonstrated in the Leischman case.

CHAIRMAN BENOY: All right, we will now go to the next. I asked Mr. Hobson to come in and take care of that. He seemed to know a lot about it. That is 71(a)—Condemnations. Mr. Heyl, will you take up that Rule 71(a)?

MR. HEYL: I don't know enough about it to discuss it excepting what Mr. Hobson told me. I read it, is all. It is a very complicated rule and I thought he was going to discuss it.

CHAIRMAN BENOY: The point that has been made is, that is the same rule with reference to condemnation of which we are speaking, which has been before Congress for adoption on three different occasions, embodied in House Bill 7274, House Resolution 2617, and Senate Bill 975. They were known as the Dive

Bombing Bills. It permits the Government to move in and take possession of the property without any search of title whatsoever, giving apparent ownership as to one property and taking the whole number of properties involved within the condemnation suit without further notice. Of course, it affects insurance companies by the fact that insurance companies have investments. I am not able to discuss it any further. Has anybody made a study of it at all? If so, are you willing to discuss it?

Well, that is that, I guess. Any other rules that any members of the Committee would like to discuss?

MEMBER: Mr. Chairman, in connection with the report, it seems to me there should be some revisions to avoid conflict recommendations made by Mr. Hinshaw and Mr. Stichter and the time of the report.

MR. SLAYTON (Ga.): Mr. Chairman, are you all over that Rule 59?

CHAIRMAN BENOY: Would you like to say something about that, Governor?

MR. SLAYTON: I would like to ask a question. Instead of having that read "rehearings of chancery?", why would the person have the right to make a motion for a new trial if the judge has clearly indicated he has shown an error in his judgment? It said an action tried without a jury. Now in that case, instead of having the chancery provision, why would you appeal to a judge, if he has indicated an error? For example, he might have rendered a decision deciding the law as so and so and the court of appeals decides subsequently or while he is trying the case and announce a contrary opinion. Why shouldn't you have the right to apply to the judge on that ground without reference to the old plan?

CHAIRMAN BENOY: I couldn't answer that, but I do say this, that under our practice you would have to file a motion for a new trial in the chancery case if you were going to ask the higher court to review the weight of the evidence.

MR. SLAYTON: I notice on this page that feature doesn't seem to be dealt with and I wondered why you just shouldn't be allowed that?

CHAIRMAN BENOY: The Advisory Committee didn't see fit to include that in their list of amendments. That is our report, that you have in your hand. They didn't see fit to include that in their list of rules needing amendment, so it stands as it was. Do you care to hear it read as it is?

MR. STICHTER: What you have there are the proposed changes proposed by this Association. Now Rule 59 reads: (Mr. Stichter read rule 59.)

MR. SLAYTON: That last that you have just read, why should that be in there? Why shouldn't you have a right to ask the judge, say, "Judge, since you have rendered this decision, four courts of appeal have decided contrary. I ask to have you, on account of your manifest error, grant me a new trial." If you had a right to say to the judge, who is somebody drunk to somebody sober, "I am appealing to you that way."

MR. STICHTER: You are raising a question of the advisability of having the rule amended. The Advisory Committee has not made any recommendations regarding any amendment to Rule 59. Of course, our discussion here today is dealing with the amendments that have been proposed by the Advisory Committee.

MR. SLAYTON: You might say, "Judge, I want to ask you if you are not in error. Ought you not decide?"

MR. STICHTER: Well, there would be grounds enough.

CHAIRMAN BENOY: Any further questions? We will consider the meeting adjourned, then. (Recessed at 3:58 p.m.)

Proposed Amendments to Rule 14 of the Federal Rules of Civil Procedure

By Wilbur E. Benoy
Columbus, Ohio

THIRD-PARTY practice provided in Rule 14 of the Rules of Civil Procedure has proven to be a source of considerable difficulty and a divergence of judicial decisions. Articles have been prepared in prior years by members of this organization reviewing the conflicting decisions and discussing the questions raised in the application of the rule.[1] The problems heretofore discussed fall mainly under the following classifications: (1) jurisdiction and venue; (2) compelling plaintiff to replead; and (3) who may be brought in as third party defendant.

The Advisory Committee has made proposals deleting certain words and making certain additions.

Perhaps the most discussed questions arising in the application of this rule concern the matters of jurisdiction and venue. There is no necessity here of discussing the many reported cases as they have been discussed at length in many recent articles.[1] The proposed amended rule contains nothing in answer to these questions. Litigants will be just as much in the dark as before on these points and will find the operation of the rule differing from district to district.

The proposed amended rule purports to answer the many criticisms directed to the practice of compelling a plaintiff to replead against a third-party defendant whom he did not choose to make a party and whom, presumably, he did not desire to be a party. The existing rule provides that the defendant may obtain leave to serve a summons and complaint:

> "upon a person not a party to the action who is or may be liable to him or to the plaintiff."

It is proposed that the words "or to the plaintiff" be deleted. This deletion above might accomplish the purpose sought. However, the fourth sentence of the proposed revision seems to be inconsistent with the purpose sought to be accomplished. That sentence (lines 24-28) reads:

> "The third-party defendant may also assert against the plaintiff any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

If the third-party defendant, who is brought into the case by the original defendant, takes advantage of this provision and asserts a claim against the plaintiff, certainly the plaintiff will find himself in the position of having to replead against the third party defendant, although he did not desire that the third-party defendant be in the case in the first place. One of the reasons persuading a plaintiff not to make a certain person a party defendant may well be the expectation that such person, if a party, will file a counter-claim against the plaintiff. Under the proposed rule the plaintiff's purpose in deliberately omitting a cerain person as a party defendant may be thwarted and the plaintiff find himself compelled to plead against a party whom he had no intention of suing.

Also, (lines 28 to 39) the plaintiff may assert against the third-party defendant, who has been brought into the case by the original defendant, any claim which a plaintiff has against the third-party defendant arising out of the transaction or occurrence set forth in the plaintiff's claim and the third-party defendant must thereupon assert his defenses.

Also, (lines 39 to 44) the third-party defendant, who has been brought into the case by the original defendant, may proceed against any person "not a party to the action who is or may be liable to" the third-party defendant for all or part of the claim made

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[1] L. J. Carey, "Third-Party Practice under Rule 14", Report of Proceedings of Section of Insurance Law, American Bar Association, Detroit Meeting, 1942, p. 272.

George J. Cooper, Third-Party Practice under Rule 14 of the Federal Rules of Civil Procedure, Report of Proceedings of Section of Insurance Law, American Bar Association, Chicago Meeting, 1943, p. 291.

Alexander Holtzoff, "Desirability of Amending the Federal Rules of Civil Procedure", Report of Proceedings of Section of Insurance Law, American Bar Association, Detroit Meeting, 1942, p. 265, 267-268.

See also: Lon Hocker, Jr., "Expanding Federal Jurisdiction under Third-Party Practice", Insurance Counsel Journal, July 1942, p. 32.

John W. Willis, "Five Years of Federal Third-Party Practice", Virginia Law Review, Vol. XXIX, No. 8, June 1943, p. 981.

in the action against the third-party defendant.

The question as to who may be brought in as a third-party defendant is of particular interest to insurance counsel. The matter of whether or not an insurer or indemnitor can be made a third-party defendant has been discussed.[3] However, there is a dearth of reported decisions on this point.

The language found in both the first and last sentences of Rule 14(a),

"who is or may be liable to him",

is very broad in its scope and could be considered as including persons primarily, secondarily, conditionally and contingently liable. It has been held that in the proper case a defendant might implead his own insurer.[3]

As an answer to the complaint that an insurer may be impleaded, commentators have said that, as a practical matter, such impleading would be a breach of the cooperation clause.[4] This is questionable. It is true that the defense is usually being conducted by counsel retained by the insurance company and there is no possibility of an attempt to implead the insurer. However, it is not difficult to conceive of a situation wherein the defendant has his own counsel who might consider it highly desirable to implead the insurance company. For example, in a situation where the policy limits may be $10,000.00 and a verdict anywhere from $7,500.00 up to $15,000.00 may be anticipated, the defendant's counsel may wish to bring the insurer into the case so that the limits of liability under the policy can be disclosed with the reasonable expectation that the jury would limit its verdict to the amount of available insurance. Whether or not such action on the part of the defendant and his counsel would be held to constitute a violation of the cooperation clause is at least a debateable question. Or in the case where the insurer is defending under a reservation of rights, the insured defendant may implead the insurer in order to have the questions arising under the reservation of rights determined in the same action. Such procedure would very probably prove disadvantageous to the insurer; but insured's conduct would not appear to be a lack of cooperation.

In summary, the proposed amended rule makes no attempt to clarify the questions of jurisdiction and venue; the practice of forcing the plaintiff to plead against his wishes would continue in the application of the fourth sentence; and the indefinite description of the persons who may be impleaded is unchanged. If the rule is to be retained the limits of jurisdiction and venue should be definitely defined, the possibility of a plaintiff having to plead involuntarily against a third party should be eliminated and the scope of definition of the persons who may be impleaded should be limited so as not to include those whose liability is wholly contingent or conditioned upon a judgment being obtained by the plaintiff against the defendant.

It is respectfully submitted that the Advisory Committee, in making such a complicated provision, has gone far beyond what is necessary or advisable. The difficulties to be encountered under the proposed revision are certainly slightly less than those which have been met under the present rule. We recommend that the defendant be left with his rights and remedies as against the person liable over to the defendant in such actions as may be available to him. It is our view that Rule 14 should be abolished in its entirety.

We recommend that in the place and stead of Rule 14, in order to maintain the status in tort actions in those states where contribution in tort exists and wherein a defendant is given by local law, the right to vouch in other joint tort-feasors; and, in order to maintain rights arising in contract cases the following:

"RULE 14—Parties Jointly or Concurrently Liable. Before the service of his answer, a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave to bring in and make a co-defendant, any person or persons who may be jointly or concurrently liable in tort to the plaintiff or as against whom the defendant may have a right of contribution, and any person who may, on contract, be jointly or severally liable or as against whom a defendant has the right of contribution on contract. If the motion is granted and the summons and complaint are served, the person so served shall be known as a co-defendant and shall make his defense as to such claim as provided in Rule 12 and his counter claims against the defendant as

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[3] See Professor Willis' article cited in Note 1 at p. 988. Proceedings of Institute on Federal Rules, Cleveland 1938, pp. 250-254.

[3] *Tullgren v. Jasper v. Maryland Casualty Co.*, 27, F. Supp., 413 (D.C.Md. 1939); *Crum v. Appalachian Electric Power Co.* et al., 29 F. Supp. 90; *United States v. S. R. Jollimore et al v. Holland Furnace Co.*, 2 F.R.D. 148.

[4] See Note 2.

provided in Rule 13. The co-defendant may assert against the plaintiff any defenses which the defendant has to the plaintiff's claim."

If the proposed revision of Rule 14 must stand, then, in lines 7 and 8 and 41 and 42, with respect to "who is or may be liable to him" that the rule be made definite and certain by stating whether it is meant that such person be primarily liable, secondarily liable, contingently liable or conditionally liable. If the proposed rule is to be adopted, then the phraseology should be made clear so that it may be determined who can or cannot be brought within the confines of the rule.

Further, if the proposed rule is to be adopted, clarification of the questions of venue and jurisdiction should be clarified by confirming the application of the rule to such third-party defendants as may be found within the jurisdiction of the court and with respect to whom an independent action, which might be brought against him by the defendant, would be cognizable in the district in which such action is filed.

Discussion of Amendments to Rule 33 of the Federal Rules of Civil Procedure

By J. H. Hinshaw
Chicago, Illinois

IN the proposed amendments to Rule 33, I am unalterably opposed to the use of the following phrases:

"As justice may require."

"Except as justice may require."

"Which is appropriate and just."

The words 'appropriate and just' are limited by Rule 30(b), but Rule 30(b) closes by saying "or the Court may make any other order which justice requires to protect the party or witness from annoyance, expense, embarrassment or oppression." While most of us have a very high regard for most of the judges of the District Courts of the United States, it is my opinion that such expressions as "as justice may require", and "which is appropriate and just", gives to the District Judge a discretion too wide for justice and a uniform enforcement of the law.

Such expressions as these, in the rules, result in a rule by man and not a rule by law. This leaves the door unnecessarily wide open for arbitrary and tyrannical rulings.

To illustrate, on page 46 of the preliminary draft of proposed amendments to the rules, in the note under Rule 33, it is stated, "Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds." (Citing cases.) "Other courts have read into the Rule the requirement that interrogation should be directed only towards 'important facts', and tended to fix a more or less arbitrary limit as to the number of interrogatories that could be asked in any case."

I believe most trial lawyers will agree that the Circuit Court of Appeals allows very wide latitude to a District Judge in every circumstance where the District Judge is given discretion, and expressions such as "as justice may require", leave the whole matter to the discretion of the District Judge. Therefore, there is practically no appeal.

It should be the duty of the rule makers to state, in more definite terms, the procedural law, and the penalties which may follow the failure to obey the ruling of the Court.

In place of the wording (lines 29 to 34), "If interrogatories are served after a deposition has been taken or if a deposition is sought after interrogatories have been answered the Court, on motion of the deponent or the party interrogated, may make such protective order as justice may require", I suggest the following wording, namely: "If interrogatories are served after a deposition has been taken or if a deposition is sought after interrogatories have been answered the Court, on motion of the deponent or the party interrogated, may make such protective order as will relieve the deponent or party interrogated from a duty to furnish the same information twice." A few decided cases indicate that the wording above suggested is in reality what the rule means. (See Currier v. Currier, 6 Fed. Rule Serv. 33.61, Case I; McNolly v. Simmons, 3 Fed. Rule Serv. 33.61, Case I). These

decisions, however, probably have no binding force and there is no good reason why the rule should not be made more specific.

Again instead of the wording (line 34 to 37), "The number of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment or oppression", I suggest the following wording, namely: "The number of interrogatories to be served is limited to such number as may reasonably be designed to procure one full and direct answer regarding each matter or item of information which may be inquired into under Rule 26."

I suggest that the last sentence (line 37 to 39), "The Court, in ruling on objections to interrogatories, may make any order specified in Rule 30(b) which is appropriate and just", be eliminated altogether.

Discussion of Rule 34

The words in Rule 34, "showing good cause therefor", are too indefinite to serve any useful purpose, and might be used by the Court to prevent any effectual use of Rule 34. In my opinion, the right to the discovery and inspection provided for in Rule 34 should be as nearly absolute as possible, and the wording of the amendment, "relating to any of the matters within the scope of the examination permitted by Rule 26(b)" is sufficient to protect the parties, and the undefined phrase, "showing good cause therefor" is only an impediment to the usefulness of the Rule.

That suggested amendment of Rule 34 by which the words "material to any matter involved in the action" are changed to read "relating to any of the matters within the scope of the examination permitted by Rule 26(b)" and by which the word "revelant", is expanded to the expression "without the scope of the examination permitted by Rule 26(b)", for the sake of consistency, transfers the limitation back to Rule 26(b), which is likewise amended by additional wording which expands the right to discovery. This amendment to Rule 26(b) namely: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony is sought for the purpose of discovering admissible evidence", may lead to fishing expeditions which will abuse the purpose of the rule. It is true the scope of the discovery frequently needs to go beyond the scope of what would be material evidence on the trial, but if the discovery rule is not to be used for purposes of unreasonable search and seizure it must be carefully defined. I suggest the following wording in lieu of the foregoing suggested amendment, namely,

"It is not ground for objection that the testimony will be inadmissible at the trial, if the testimony is sought for the purpose of discovering admissible evidence, and it affirmatively appears reasonably probable that the testimony will reveal admissible evidence."

Rule 34 is a most useful legal instrument, but unless its limits are clearly defined, its abuse may easily bring about unjust and tyranical results. In the case of *Leach v. Grief Bros. Cooperage Corp.*, 2 F.R.D. 444, decided in the District Court of Mississippi, Jackson Division, it was held by the court that where written statements signed by an employee and a third party concerning the employee's claim for injuries sustained while the employee was working for the defendant employer, were obtained and turned over to the employer's attorney by one who represented the employee by power of attorney, the statements which contained material evidence were not "privileged" within the federal rules relating to the inspection of documents, and the employee was entitled to inspect and copy the statements. The Court stated that the federal rules must be liberally construed so as to prevent surprise and delay, and further that the inspection and copying of the statements might make unnecessary lengthy direct and cross examinations.

The Court apparently lost sight of the fact that more important than surprise and delay is the fact that the purpose of the trial is to arrive at the truth. No better method of testing the truth of testimony has been devised than that employed in searching cross-examination. It must be obvious to any trial lawyer that perjury cannot be avoided nor uncovered if the perjurer is allowed to see his signed statements before he testifies. If he is allowed to see his opponent's file, he can easily prepare perjury which will avoid exposure. Until comparatively recently, it has been the theory of all of our law that a person should be allowed to enjoy the fruits of his labor, and the ruling in the Leach case would permit a lazy lawyer to enjoy the fruits of the labor of a lawyer who had procured information by great diligence and probably through great expense, for the protection of his client.

Also, in our own jurisdiction, this rule has been used to force one party to reveal to the other party the names and addresses of all of his witnesses.

Contrary to the holding in the Leach case, are the following:

Slydell v. Capital Transit Co., 1 F.R.D. 15;

Kenealy v. Texas Co., 29 Fed Supp. 502;

Bennett v. Waterman S. S. Corp., et al, 29 Fed. Supp. 506;

See also—Cyclopedia of Fed. Procedure 2nd Ed. Sec. 2832.

In these cases, requests to furnish documents of a like character were denied.

In order to avoid the unjust results arrived at in the Leach case, it has been suggested that the word "privilege" in Rule 34 be given a special definition so that documents procured in preparation for trial would be "privileged". The word "privilege", however, already, through thousands of decisions, has developed a more or less definite meaning, and any attempt at this time to re-define the word will only result in further confusions, and weaken the force of the decisions defining the word "privileged", upon which decisions most of the lawyers of the country have come to rely.

Therefore, instead of attempting to re-define the word "privilege" or to give it a special meaning for the purpose of this rule, it is my suggestion that an additional paragraph be made a part of Rule 34, as follows: "This rule shall not apply to memoranda, reports, statements, or documents prepared by or for either party in preparation for trial, nor to any communication between any party or his agent, and the attorney for such party." With the exception of the one word "statements" this suggested paragraph is a part of the Rule 17 of the Supreme Court Rules of the State of Illinois, and has worked admirably well over a period of several years.

Of special interest to insurance lawyers is the frequent use and attempted use of Rule 34 for the purpose of procuring information through autopsy.

Under this rule, autopsy was ordered in the case of *Zalatuka v. Metropolitan Life Insurance Company*, 108 Fed (2nd) 405, a Wisconsin case decided in 1939. The Court stated that the order was "based upon the order of discovery which was procedurally a part of the law action". It is my opinion that where information may be obtained by autopsy each party should have an equal opportunity to obtain such information, and that this right should be clearly expressed in a paragraph of Rule 34, so that the practice will be universal and uniform. To this end, I suggest adding to Rule 34, the following paragraph:

> "The Court may, within a reasonable time, order an autopsy in the presence of at least one representative of each party to litigation, wherever it appears by petition filed with the Court, or otherwise, that it is reasonably probable than an autopsy will reveal admissible evidence which could not otherwise be discovered and approved; and exhumation of a body may be ordered for the autopsy where it further appears that an autopsy at an earlier time was impracticable, or was omitted through no lack of reasonable diligence on the part of the party requesting the autopsy."

DISCUSSION OF AMENDMENTS TO RULE 36

Each of the amendments suggested in the preliminary draft of proposed amendments to Rule 36 meet with my approval.

Proposed Amendments to Rule 56, Summary Judgment

BY WAYNE E. STICHTER
Toledo, Ohio

THE Advisory Committee on Rules for Civil Procedure as a whole favor an amendment to subdivision (a) of Rule 56 and an amendment to subdivision (c). However, some members of that committee have proposed an alternative rule which not only embodies the changes favored by the Advisory Committee as a whole but which also contains further changes in line with and as a part of the proposed Alternative 3 to Rule 12. I shall first discuss the amendments favored by the Advisory Committee as a whole; toward the close of my remarks I shall make a few observations regarding the alternative draft of Rule 56.

Rule 56 provides that any party may "move with or without supporting affidavits for a summary judgment in his favor upon all or any part" of a claim; and that such summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any show

that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Under subdivision (a) of Rule 56 as it now exists, a party *seeking* to recover upon a claim, counterclaim or cross-claim may file a motion for summary judgment only "after the pleading in answer thereto has been served" whereas under subdivision (b) a party defending against a claim, counterclaim or cross-claim may file a motion for summary judgment "at any time."

The Advisory Committee now proposes to amend subdivision (a) so as to permit the plaintiff, or a party in the position of a plaintiff, to file a motion for summary judgment "at any time after the commencement of the action", just as subdivision (b) now allows a defendant to do.

This proposed amendment to subdivision (a) is designed to meet the contention that has been advanced that the present rule shows favoritism to the defending party. It is also argued that the plaintiff's right to a summary judgment should not be postponed until the defendant has filed formal answer; that it is unfair to permit the defendant by the use of dilatory motions to postpone the filing of his answer and thereby prevent for the time being the summary judgment to which the plaintiff may clearly be entitled. While the proposed amendment would seem, at first blush, to be in the interest of more expeditious litigation and therefore highly desirable, a careful study of the proposal discloses certain disadvantages which, I submit, outweigh any just benefits to be derived from such change.

The proposed amendment to subdivision (a) would in many instances give to the plaintiff a substantial but unjust advantage over the defendant. Before filing suit, the plaintiff's attorney ordinarily has an opportunity to investigate thoroughly the facts of his case as well as the law applicable thereto. In the course of his preparation of the complaint, he can carefully and meticulously assemble all the facts which he needs (1) to support his complaint, (2) to support any motion for summary judgment he may decide to file with his complaint, and (3) to resist any motion for summary judgment the defendant may file. This preparation by the plaintiff's attorney may take weeks or even months.

But what of the defendant and his attorney? It many times happens that the defendant is sued unexpectedly and is wholly unprepared to furnish promptly to his attorney (if he has one) more than a sketchy account of the facts. The defendant's need for time to secure a lawyer and the lawyer's need for time to investigate the facts and the law is recognized by Rule 12 which grants to the defendant, as a matter of right, 20 days in which to admit or controvert the claims made in the complaint. Quite frequently, those 20 days are insufficient and the attorney finds it necessary to request an extension of time which may or may not be granted. Under the proposed amendment, the defendant could be required to meet the claims made in the complaint and to produce competent proof that he has a real defense, all within 10 days of the service of the complaint upon him. Surely, a defendant should not be compelled to answer a motion for summary judgment short of the time given him for filing an answer to the complaint.

Moreover, if the complaint is subject to a motion for a more definite statement or for a bill of particulars, the defendant's difficulty in resisting the motion for summary judgment would be multiplied. In the interest of fairness and justice, it would seem that in such case defendant should be entitled to a more definite statement or to a bill of particulars before being called upon to defend by proof against a motion for summary judgment.

The proposed amendment may also work a severe hardship upon the plaintiff. In the event a counterclaim or cross-claim is asserted against him, the plaintiff may find himself wholly unprepared to defend against a motion by the counterclaimant or cross-claimant for a summary judgment. This lack of preparation on the part of the plaintiff might well occur if the counterclaim or cross-claim should not arise out of the transaction or occurrence which is the subject matter of the plaintiff's complaint.

It may be argued that subdivision (f) of Rule 56 affords relief to a defending party who is handicapped by lack of time in resisting a motion for summary judgment. It is to be noted, however, that subdivision (f) authorizes, *but does not compel*, the court to grant a continuance of the hearing on the motion; a continuance is not a matter of right, but a matter of discretion.

In my humble opinion, the proposed amendment will not further the cause of justice; it will hamper it. It is not unreasonable to sup-

pose that in many cases an attorney for a claimant will seek to exploit this decided advantage which the amendment gives to a claimant; hoping to catch the defending party unprepared, he will be tempted to press for a summary judgment when he is clearly not entitled to a judgment. The time of the court will be consumed in hearing applications by the defending party for continuances, and, later, in the consideration of numerous affidavits counter-affidavits and depositions offered at the hearing of an ill-founded motion for summary judgment. These occurrences will increase the work of the court, will increase court costs, and will delay rather than expedite the disposition of cases. It is submitted that the proposed amendment to subdivision (a) should not be adopted.

The Advisory Committee proposes to amend subdivision (c) of Rule 56 in order to clarify its meaning. The pertinent portion of the present rule reads:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, *except as to the amount of damages*, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In Sartor et al v. Arkansas Natural Gas Corp., 321 U.S. 620, Mr. Justice Jackson in alluding to the words "except as to the amount of damages" as employed in Rule 56(c) said:

> "Where the undisputed facts leave the existence of a cause of action depending on questions of damage *which the rule has reserved from the summary judgment process*, it is doubtful whether summary judgment is warranted on any showing."

The Advisory Committee apparently felt that the doubt expressed by the Supreme Court in an interpretation of its own rule should be resolved by an amendment. It has therefore proposed that the words "except as to the amount of damages" be deleted from the third sentence of subdivision (c) and that the following new matter, comprising a single sentence, be added at the end of Subdivision (c):

> "A summary judgment may be given on the issue of liability alone as distinguished from the amount of damages."

It may be admitted that an amendment ot subdivision (c) is desirable in the interest of clarity. But it is submitted that the proposed amendment does not provide the desired clarity. The proposed amendment was intended to make clear that where there is no genuine issue as to liability, the existence of a genuine issue as to the amount of damages should not prevent a summary judgment on the issue of liability. It was also intended to make clear—to use the words of the Advisory Committee—"that where the question of any recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case". However, the intention of the Advisory Committee is not clearly expressed.

It may be plausibly argued that the new matter—"A summary judgment may be given on the issue of liability alone as distinguished from the amount of damages"—is restrictive of the third sentence (the preceding sentence) and is to be interpreted as authorizing a summary judgment only on the issue of liability and not on the issue of the amount of damages.

It is suggested that the intention of the Advisory Committee would be more clearly expressed in this manner:

First. Delete from the third sentence of subdivision (c) the words "except as to the amount of damages."

Second. Add the following new matter to subdivision (c), such new matter to constitute the fourth sentence thereof:

> "If there is a genuine issue as to the amount of damages but there is no genuine issue as to liability, a summary judgment may be given on the issue of liability alone."

Certainly if it is decided to amend subdivision (c) for the sake of clarity, the amendment should be expressed in such clear and unambiguous language as to leave not the slightest doubt as to its meaning.

I shall now discuss briefly the alternative draft of Rule 56 as prepared by some of the members of the Advisory Committee. The changes proposed by the Advisory Committee as a whole and which I have already discussed are incorporated into the alternative draft. There is however another important change that challenges our attention.

Under the alternative draft, the time for the filing of a motion by the plaintiff for a summary judgment is eliminated from subdivision (a) and is incorporated in (c). Likewise, the time for the filing of such motion by defendant is eliminated from subdivision (b) and is incorporated in (c). Subdivision

(c) of the alternative draft reads in part, as follows:

> "A motion by a claimant may be made at any time after the commencement of the action. A motion by a defending party may be made before serving a responsive pleading within the time and in the manner permitted by Rule 12(b) [Alternative 3 of 12(b)]; or it may be made at any time after a responsive pleading has been served or where no pleading is required."

The time permitted by the alternative draft 3 of Rule 12(b) is "within 20 days after the service of the pleading upon him." Hence, Alternative Rule 56 while permitting a plaintiff to file a motion for summary judgment at any time after the commencement of the action (just as is permitted by the amendment favored by the Advisory Committee as a whole), requires a defendant to file his motion for summary judgment as follows:

(1) If the defendant is not required to file an answer, he may file his motion at any time.

(2) If the defendant has already filed his answer, he may file his motion at any time.

(3) If an answer is required to be filed, and the defendant wishes to move for a summary judgment before filing his answer, he must file his motion for summary judgment within 20 days after the service upon him of the complaint.

It is difficult to understand the necessity or purpose of this restriction upon a defendant. So far as I know no explanation for this restriction has been attempted. Perhaps no such restriction was intended. But it is there and it should not be there.

It is submitted that Alternative Rule 56 should not be adopted.

Rule 50—Motion for a Directed Verdict; And for Judgment

By G. L. Reeves
Tampa, Florida

RULE 50, as now drawn, is divided into two sections—(a) and (b).

Section (a) provides that the making of a motion for directed verdict does not waive the offering of testimony if it is not granted nor waive the trial by jury even though both parties make motion. The Committee has recommended no changes in this portion of the rule.

The Committee has suggested numerous changes in Section (b) of Rule 50. In substance, Section (b) now provides that if the motion for directed verdict is not granted, the Court is deemed to have reserved the legal questions raised, provides that the moving party may within ten days after verdict move to have the same set aside and judgment entered in accordance with his motion for directed verdict, that new trial may be joined in this motion or prayed for in the alternative.

The principal changes were the deletion of the provision that the Court is deemed to have reserved the legal questions, that if the motion for judgment is not filed and the Court fails to order judgment on the motion for directed judgment within 20 days after verdict, it is equivalent to a denial of the motion, and that where a new trial is prayed for in the alternative, the lower court, if motion for judgment is granted, should likewise rule on motion for new trial but the same would be effective only if the judgment is reversed and remanded for further proceedings.

I shall attempt to discuss these suggested amendments in some detail.

1. *Lines 1 to 8.*

The first suggested change to rule 50(b) is the deleting of that portion stating that whenever a motion for a directed verdict made at the close of all the evidence is denied, the Court is deemed to have submitted the same to the jury subject to a later determination of the legal questions in the motion.

The Advisory Committee gives as its reason for striking this portion that it is an awkward fiction resulting from a meticulous effort to stay within the limits of *Baltimore & Carolina vs. Redman,* 295 U.S. 654, but recognizes that the court should have this power regardless of whether he reserves or is "deemed" to have reserved the question and further states that if the committee is wrong and the change cannot be made, in view of

Slocum vs. New York Life, 223 U.S. 364, the portion should not be deleted.

It is my firm conviction that the change should not be made. Many of the cases have emphasized this provision in the rule and stated in effect that it disposed of any doubt as to the power of the court to later rule upon the motion.

The Supreme Court of the United States in the case of *Montgomery Ward vs. Duncan*, 311 U.S. 243, 85 L. Ed. 147, states "prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct the verdict." The Advisory Committee says, in effect, that the Court should have the right to later rule upon the question of law in the motion, whether it is deemed to have reserved the question. The Advisory Committee should very well fear the effect of the holding in *Slocum vs. New York Life*, supra, if this portion of the rule is deleted for in that case the Supreme Court of the United States held that although the lower court committed error in refusing to instruct the verdict, the appellate court could not direct the entry of a judgment for the defendant although that case arose in Pennsylvania which had a law permitting entry of a judgment for the defendant under such circumstances. The Supreme Court pointed out that the Federal Rule was different from the Pennsylvania practice and the state practice did not control.

If this portion is now deleted would the courts not justifiably reach the conclusion that since the provision had been in the original rule and deleted in an amendment, a clear intention was shown that the ruling on the motion was not reserved? The Committee's answer to this would, no doubt, be that the sentence beginning with line 29 would take care of the situation. I do not think the suggested sentence would have that effect but would only tend to confuse the courts.

2. *Lines 8 to 14.*

The only suggested change is the inclusion of the words "at the close of all the evidence" which would be required if the first portion is stricken. In connection with this part of the rule, attention is called to the case of *Reliance vs. Burgess*, 112 Fed (2d) 234, Eighth Circuit. A motion for judgment notwithstanding the verdict or a new trial in accordance with Rule 50(b) was served on the opposite party within ten days but not actually filed within the ten days. The motion was later denied and appeal taken. The Court held that the time for taking appeal did not run from date of the judgment "where a timely motion for judgment notwithstanding the verdict or a new trial has been served within ten days of the date when the judgment was entered." This evidently means that if the motion is served upon the opposite party within ten days, it may be filed at a later date. While the rule is being amended, it might be advisable to definitely provide the motion must be filed within ten days.

3. *Lines 14 to 21.*

This portion can properly be deleted because all the provisions thereof are later covered.

4. *Lines 21 to 25.*

The amendments suggested to this portion of the rule are to delete the words "reopen the judgment" and to insert the words "vacate it". This is only a clarifying amendment and if the court orders a new trial or directs the judgment for the moving party, it would naturally vacate the judgment. The words "as if the requested verdict had been directed" are to be deleted and the words "for the moving party" are to be inserted according to the amendment. This is consistent with the Committee's recommendations that the rule be amended by striking out the provision to the effect that the court is deemed to have submitted the question to the jury subject to a later determination of the legal questions involved on the motion for requested verdict.

5. *Lines 25 to 29.*

This sentence is to be amended by adding the words "on motion" as indicated therein. The Committee made no particular comments on this suggested change but, as I understand the rule, if there is a mistrial, then the court cannot later grant a motion for directed verdict unless motion be made therefor. I cannot see any reason to limit the power of the court where no verdict is returned when it is not limited in case a verdict is returned and, therefore, I am not in favor of the proposed amendment to this sentence. I can see no necessity of providing for filing, after a trial, a motion for judgment in accordance with the motion for directed verdict except to permit the inclusion in the motion for judgment of grounds additional to the grounds that were contained in the motion for directed verdict. Therefore, I see no need to provide that in

case of a mistrial, a motion for judgment, in accordance with the motion for directed verdict, would necessarily have to be filed. The parties should be permitted to rely on the motion for directed verdict if they have no additional grounds to be submitted.

6. *Lines 29 to 34.*

This provides in substance that if after verdict the party does not make a motion for judgment, failure of the court to order a judgment in conformance with the motion for directed verdict within 20 days after verdict is equivalent to a denial of the motion for directed verdict *and of a motion for judgment.* In other words, the court's failure to act within 20 days after verdict on the motion for directed verdict shall be equivalent to a denial of a motion for judgment which has not been filed. I cannot understand the necessity of the words *"and of a motion for judgment"* and it seems that these words should be deleted because if the party has not filed his motion for judgment within the ten days allowed by the rule, he has lost that privilege. Often, in the heat of a trial, legal questions arise which need mature consideration by the Court and the effect of rule 50(b) is to allow the court further time to consider these questions. The particular sentence under discussion allows them 20 days. It would seem advisable to reduce this period of time to 10 days giving the court the right to extend the period if he desires. In other words, if he realizes that he cannot dispose of the matter within 10 days, he might enter an order extending the time, but the rule should provide a limit on his extension so that the matter would not be indefinitely delayed.

7. *Lines 35 to 43.*

This, in my opinion, is the crux of the proposed amendments and becomes desirable because of a conflict of interpretations. There have been cases where a motion for judgment filed after verdict was granted by the district court and no ruling made upon the alternative motion for a new trial. Some of these cases have been appealed and reversed by the appellate courts. The question then arose as to whether the case should be remanded for a ruling by the trial judge upon motion for new trial and finally one of these cases reached the Supreme Court of the United States—*Montgomery Ward vs. Duncan,* 311 U.S. 243, 85 L. Ed. 147. There the defendant filed a motion for judgment after verdict and asked for a new trial in the event the Court refused to set aside the verdict. The lower court granted the motion and entered judgment notwithstanding the verdict. The Circuit Court of Appeals reversed the trial judge and held in effect that when the court sustained the judge and held in effect that when the court sustained the motion for judgment, the motion for new trial passed out of the case and, therefore, ordered the district court to reinstate the verdict. The Supreme Court of the United States held that the case should go back to the trial court so that he could pass on the motion for new trial and, in reaching the decision, discusses rule 50(b) at length and states that under rule 50(b) the trial court should rule both upon the motion for judgment and motion for new trial.

The proposed amendments lines 35 to 43 merely carry forth this holding into the rule. One member of the committee is not in favor of this addition to the rule because he thinks the provisions are to condensed, will not have the effect which the draftsman intended and would be better to leave the rule as it is with the interpretation of the Supreme Court.

In my humble opinion, the amendment is desirable as it clearly and definitely sets forth the procedure to be followed and I think there is much less chance of misinterpreting the rule than there is of misinterpreting the Supreme Court decision.

The case of *Madden Furniture Company vs. Metropolitan Life Insurance Co.,* 117 Fed (2d) 446, and on second appeal 127 Fed (2d) 837, is rather interesting in considering this rule. In a suit on life insurance policy the defendant made a motion for directed verdict at the close of all the evidence. It was denied and the jury returned a verdict for the plaintiff, and the defendant filed a motion for judgment notwithstanding the verdict. This motion was denied and the defendant appealed. The Court of Appeals reversed the judgment and remanded the case for "further and not inconsistent proceedings"; in the course of the opinion the court practically said plaintiff did not have a case. When the case came down, the district court entered an order granting the motion for judgment notwithstanding the verdict and another appeal was taken at which time the court of appeals said that it had not intended that the motion notwithstanding the verdict be granted but had intended that a new trial be ordered.

RULE 52

FINDINGS BY THE COURT

(Page 57—Pamphlet)

There are two suggested changes. The first is the insertion of the words "including cases tried with an advisory jury." This just removes any ambiguity in the rule and the amendment is desirable. Second, provision is made that findings of fact and conclusions of law may be incorporated in any opinion or memorandum of decision that is filed. You will note the change begins in line 17. The reasons for this change are amply set forth on pages 58 and 59 of the pamphlet and need no further comments.

Two circuits (the seventh and ninth) held that the function of the court where, at close of plaintiff's evidence, the defendant successfully moves for dismissal is different than on a motion to direct a verdict and that he should make his findings while the third circuit has held that his function is the same and that his only duty is to decide whether the evidence would support a judgment for the plaintiff and, therefore, findings are not required. The Advisory Committee has invited comments on this problem.

To those counsel who regularly represent defendants, I think it would be very beneficial for the Court to make findings if he grants defendant's motion for dismissal at the close of plaintiff's evidence. Plaintiff's own evidence may be conflicting or may present questions of credibility. In the usual run of cases, there would be little need for the court to go into very much detail in his findings or conclusions but there are many cases where it would be very helpful.

Either rule 41 or rule 52 should be amended to provide for findings in such an instance and I think preferably the latter rule.

RULE 53

MASTERS

Rule 80(a), (b) provides for stenographic reports but an Act approved January 20, 1944, 20 USCA 9 (a) provides for official reporters in the United States District Court and, therefore, the Advisory Committee is recommending that sections (a) and (b) of Rule 80 be eliminated. If this is done, then some question will arise as to the power of a Master to have stenographic record made and it is suggested that rule 53 be amended by adding the portion shown in lines 28 to 32 authorizing the Master to direct that the evidence be taken stenographically and ordering a transcript for which fee may be taxed as costs. This amendment should be made.

Memorandum Relative to Proposed Amendment to Rules 41 and 45 of the Rules of Civil Procedure For The District Courts of the United States

BY JOHN D. RANDALL

Cedar Rapids, Iowa

MY assignment is to discuss the proposed amendment to rules 41 and 45.

Obviously, in discussing the proposed amendment to the rules, it is well to discover what was sought to be accomplished by the rules.

Undoubtedly, one of the best authorities on the object of the rules is the Honorable William D. Mitchell of New York, chairman of the Supreme Court advisory committee who in discussing the rules at the Cleveland Institute on federal rules in 1938, stated:

"Now as far the general objective of these rules are concerned, the first one of course, was the union of procedure in law and equity, * * *

"The second objective was simplicity and flexibility, with not too much detail * * *. "On any fields that the rules cover, * * *. You don't have to bother with the federal statutes, because whenever a federal statute is inconsistent with these rules, by terms of the act of congress, the statute is superseded. We have tried to adopt the best modern method of ascertaining the truth and reaching the merits of the case. That is a difficult task, but it was one of the main objectives.

"Finally, one of the objectives of these rules, one which has always been urged by the American Bar Association and believed in by this advisory committee, is that the federal rules may serve as a model for state systems. * * *

"* * * This system provides uniformity among all the federal courts. If the states follow, it will provide uniformity between the federal courts and the state courts in each jurisdiction, and on top of all that, it will develop uniformity among the different states themselves."

(Proceedings of the American Bar Association Institute at Cleveland 1938, pp. 189-190.)

We are all familiar with the fact that the advisory committee was continued after the adoption of the rules in 1938 and that the advisory committee has since the adoption of the rules encouraged discussion of the rules and proposals to amend the rules. Therefore, if we are to consider the proposed amendments to the rules we must do so upon the basis of attempting to make the rules more workable and to make them more truly carry out the intent of the Supreme Court of the United States as announced through its advisory committee.

I shall consider the manner in which the proposed amendments to the two particular rules which I have been assigned to discuss will carry out the purpose of the rules as announced by the Honorable William D. Mitchell in his address at the Institute on federal rules at Cleveland in 1938.

Rule 41 concerns the dismissal of actions and gives to the plaintiff the absolute right of dismissing without prejudice before answer except as to class action (Rule 23[c]) and provides for stipulations of dismissal and also gives to the plaintiff the privilege of dismissal upon order of court at other times during the course of trial.

The proposed amendment excepts not only the class action (Rule 23[c]) which are excepted in the present rule but also excepts as to two additional rules—one amended rule 66 and proposed rule 71A. Therefore, if the proposed amendment to the rules is adopted the plaintiff cannot as a matter of right dismiss an action without prejudice even before answer in "an action wherein a receiver has been appointed". (Rule 66 as amended.) See under the present rule:

The Chandler Building Corporation vs. Shannon, 1 F.R.D. 105.

The right to dismiss without prejudice and rules 23 and 41 were considered by the District Court of New Jersey in the case of *Delahanty vs. Newark Morning Ledger Company*, 26 Federal Supplement 327, Judge Forman stated:

"Under the early English and American doctrines plaintiff could dismiss as a matter of right at any time before judgment or decree. Later the trend modified the doctrine so as to give him such right before hearing only and thereafter gave the court discretion to weigh the injury to a defendant in a dismissal by plaintiff as of right. Now the law on dismissal * * * is declared in * * * rules 23 and 41 of civil procedure."

To illustrate the far reaching effect of the earlier American doctrine as referred to by the New Jersey District Court in its opinion, we, in Iowa, formerly operated under the rule that a plaintiff could try out his case and force the defendant to try out his case and then if after all of the evidence had been submitted and the defendants had moved for a directed verdict and the court had indicated that he was going to direct a verdict but hadn't entered such a judgment the plaintiff could then dismiss without prejudice and start the case over again. (See Oppenheimer vs. Elmore, 109 Ia. 196; 80 N.W. 307 and Morrisey vs. Railway Co., 80 Ia. 314; 45 N.W. 545.) However, under that rule if the trial judge actually made the entry sustaining the motion for directed verdict rather than merely indicate that he was going to direct a verdict, then the plaintiff had no further right to dismiss the action without prejudice. (Marion vs. Homes Mutual Insurance Association of Iowa, 217 N.W. 803; 205 Ia. 1300.)

Probably this same situation existed in many other states and the injustice of such a privilege is well illustrated when you consider such a dismissal on the part of the plaintiff might well force a defendant to prepare to defend not once but innumerable times at no greater cost to the plaintiff than the filing fee and the sheriff's fee.

It was the evils of such an arrangement which the rules apparently have attempted to correct. Major Tolman in discussing this rule at Cleveland stated:

"There has been a very great uncertainty and much conflict of authority as to the effect of various dismissals at various times and stages. This rule endeavors among

other things to provide in orderly fashion a recital of the circumstances under which a man may as a matter of right dismiss his suit without an adjudication against him of the questions therein involved, or as we used to say 'without prejudice'. * * *

"When I commenced practice in Illinois, we had in 1882 a very troublesome rule that a man might take a non-suit at any time before the jury retired. I remember a case which was tried for weeks, the instructions were read to the jury, whereupon counsel for plaintiff sensing defeat, said: 'I will take a non-suit'. A motion of that sort had to be granted, until the statute was changed."

(p. 309—Proceeding of the American Bar Association at Cleveland in 1938.)

Considering Rule No. 41 insofar as it concerns dismissals without prejudice it would seem that the rule seeks to protect the interests of the plaintiff as well as the interests of the defendant. The provision with reference to a dismissal before the service of the answer is apparently on the theory that no great harm will be suffered by the defendant if the plaintiff elects to dismiss his action without prejudice except in cases involving class action (Rule 23[c]) and by the amendment to Rule 66—actions wherein a receiver has been appointed and in cases involving condemnation of property for public use. (Proposed rule 71A).

The exception to the rule that the plaintiff may dismiss his action without prejudice as a matter of right before the service of an answer is modified by excepting from the application of the rule—cases wherein it is obvious that the defendants may have been put to great expense, inconvenience or business jeopardy because of the commenncement of the action. Without in any way passing upon the merits of the proposed amendment to rule 66 or the proposed rule 71A it seems to me that the proposed amendment to rule 41 could not be objectionable to the plaintiff and certainly should furnish a defendant with an additional safeguard to which he would be entitled.

These rules must be prepared and administered equally as to both the plaintiff and the defendant if they are to be effective. We must avoid so amending the rules as to make them unworkable or to require a technician to interpret them for then we may again be subjected to having our court rules made by the legislature rather than by the court.

Considering the proposed amendment to Rule 45 subsection (d), the present Rule reads as follows:

"45(d)—Subpoena for Taking Deposition; Place of Examination.

(1) proof of service of a notice to take a deposition as provided in Rule 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the Clerk of the District Court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. *A subpoena demanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.*"

The proposed amendment strikes the last sentence in the rule and substitutes the following:

"The subpoena may command a person to whom it is directed to produce designated documents or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 26(b), but in such event will be subject to protective orders set forth in sub-division (b) of this rule 45."

As Rule 45(b) provides that the court upon motion:

"made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or, (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers or documents."

In discussing the purpose of Rule 45(d) at the institute on federal rules in Cleveland, Mr. Edson R. Sunderland, a members of the advisory committee, said:

"Rule 34 provides for discovery of documents and tangible things. This can be had only upon the court's order, and a mere notice is ineffective. The order may provide for the inspection and copying or photographing of documents or things. There may also be an order for entry upon land or other property for the purpose of inspecting, measuring, surveying or photographing it.

"If one does not know what documents

exist and needs such information to enable him to apply for an order for their discovery, either an oral examination or written interrogatory may be employed, since rule 26(b) * * * permits such discovery regarding the existence, description, nature, custody, location and condition of documents or things which are relevant to the case.

"* * * Inspection of documents in possession of a mere witness may be obtained under rule 45(b) (1), by the use of subpoena duces tecum, on the order of the court, in connection with an oral examination.

"Therefore, there are three ways of obtaining discovery of documents: There may be an oral discovery examination of a party or of a mere witness to determine what documents exist and where they are. An order may be obtained against a party for the inspection, copying, or photographing of specific documents. And a subpoena duces tecum may be employed, on order of the court, against the party or witness." (Cleveland Institute on Federal Rules, p. 288-289.)

There can be no doubt that this rule in its original form was unnecessary as it furnished no additional protection to the witness. There certainly would be no object in making a party secure an order of court in order to use a subpoena duces tecum where such an order might be obtained without notice to the witness (See: U.S. for use of Title Roofing Co., Inc., vs. J. Slatnik Co., 8 F.R.S. 45 (d) 34 Case 1; 3 F.R.D. 408; U.S. District Court of Connecticut, March 21, 1944) and therefore, would furnish the witness with no protection. In fact, the witness is given ample protection by rule 45(b) which gives him the right to have the subpoena quashed if it is unreasonable and oppressive or gives him the further right to secure an advancement of the reasonable cost of producing the books, papers or documents. (Rule 45 sub-section (b), (1 and 2). This is the only protection he would have where the use of the subpoena was by order of court.

Considering rule 45 as a part of the method of obtaining the discovery of documents it is difficult to say, in what manner, the fact that an ex parte order of court had to be obtained before a subpoena duces tecum could be used would be of any benefit to a witness. As has been stated by Mr. Sunderland by rule 26(b), the deponent to be examined may make application to the court to have his examination limited and the court is given the right by rule 30(b) to give ample protection to such deponents sought to be examined, whether they be a witness or a party to the action. Rule 34 provides for the production of documents by a party by a motion after notice to all parties is given. This rule applies only to parties. Rule 45 in and of itself provides a method of protection which should be ample for any witness in the event the subpoena should be unreasonable or oppressive. (Rule 45[b].)

It is, therefore, submitted that the amendment proposed to rule 45(d) is desirable due to the fact that it will simplify the procedure and will not be harmful to the witnesses so subpoenaed. We may note that the provision now in rule 45(d) merely requires that the subpoena duces tecum "shall not be used" without an order of court, in other words, the Clerk is authorized to issue the subpoena but the party is not permitted to use it without an order of court. This order of court serves no beneficial purpose when the individual so subpoenaed must necessarily seek protection under rule 45(b) in order to avoid producing the books and papers after he had been subpoenaed.

In conclusion, it would be my opinion that the proposed amendments to rules 41 and 45 should be adopted in their present form.

Comments on Changes Proposed by the Advisory Committee In Rules 54, 55, 56, 58 and 60 of the Federal Rules of Civil Procedure

By Wayne Stichter
Toledo, Ohio

RULE 54

THE proposed change relates to subdivision (b) of this rule and seeks to clarify the effect of a judgment to various stages of an action.

There is undoubtedly a need for clarification in this respect. The proposed change does not entirely eliminate the confusion which has arisen under Rule 54 regarding what is or what is not a final appealable order.

I feel that the proposed change is subject to the following criticisms:

(1) The first paragraph indicates that no claim for relief can be terminated until judgment has been entered *on all claims* arising out of a single transaction. The second paragraph, however, is subject to the interpretation that the entry of an interlocutory order covering all claims *prior to the entry of a judgment* on all such claims growing out of a single transaction may constitute a termination of all such claims. The second paragraph makes clear that the entry of any order as to one or more *"but not all"* claims arising out of a single transaction before the entry of a judgment on all such claims does not terminate the claim as to such order; however, the second paragraph is subject to the interpretation that an order entered as to all such claims may be considered as terminating such claims before entry of a judgment on such claims.

(2) The arrangement is faulty. The first part of the first paragraph deals with claims arising out of a single transaction; the latter part of the first paragraph deals with claims growing out of separate transactions. The second reverts to the effect of an order on claims growing out of a single transaction. I propose that Rule 54 be changed to read as follows:

"When all claims for relief, including counterclaims, cross-claims and third-party claims, arising out of a single transaction or occurrence, have been determined, but not before, a judgment or judgments adjudicating them may be entered, and when entered shall terminate the action as to them; *and the entry of any order or orders or other form or forms of decision, however designated, as to one or more or all of such claims before entry of a judgment or judgments adjudicating all such claims shall not not terminate the action as to any such claims; and such order or orders, decision or decisions shall be subject to revision at any time prior to the entry of a judgment or judgments adjudicating all such claims.*

"The judgment or judgments may be entered even though claims, counterclaims, cross-claims or third-party claims, arising out of other transactions or occurrences, are then undertermined, but in that event, the Court may stay enforcement of the judgment or judgments until the entry of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit of the judgment or judgments already entered to the party or parties in whose favor the judgment or judgments has or have been entered.

RULE 55

The Advisory Committee has proposed no change in this rule; consequently, I have no comment thereon.

RULE 56

A discussion of the proposed change in Rule 56 is the subject of a formal paper to be presented to the Practice and Procedure Section of the International Association of Insurance Counsel. Copies of this paper will be forwarded to Mr. Benoy for transmission to the Advisory Committee.

RULE 58

The proposed changes in Rule 58 are self explanatory, and I feel are desirable; consequently, I make no comment thereon.

RULE 60

The proposed addition to subdivision (a) is desirable.

It is proposed that there be added as an express ground for relief under subdivision (b):

"fraud, misrepresentation, or other misconduct of an adverse party."

There would seem to be no sound reason for omitting this ground. Therefore, I recommend this proposed change.

Comments on Rules 52 and 58, 59, 73, 75, 77, 79, and 81

By Bennett O. Knudson
Albert Lea, Minnesota

RULES NO. 52 and 58

THE recommendations made, namely, that all motions be disposed of before judgment is entered, is concurred in. Experience has proved that this practice in state court works out very well.

RULE NO. 59

It would seem that the grounds for new trial should be set forth in the rules and I believe that suggestion is very proper. I think they could be stated so as to be all inclusive.

RULE NO. 73

The rule as amended is concurred in and it would seem that the district court should have power to dismiss an appeal on stipulation of parties or on motion of the appellant before the appeal is docketed. In fact, I never could think of any very good reason why the clerk of the district court should not have authority to dismiss actions pending on appeals without an order from the Judge of the district court provided a stipulation of the attorneys for the respective parties is filed.

RULE NO. 75

Concurred in.

RULE NO. 77

Concurred in except that it would seem a safety factor if the clerk should have some proof of the service upon the respective parties as to the date of the entry of judgment. If the discretion of the court for re-opening is liberally exercised, probably the comment is unnecessary.

RULE NO. 79

No objections.

RULE NO. 81

All proposed amendments seem practical.

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

OFFICE OF THE SECRETARY

SUPREME COURT OF THE UNITED STATES BUILDING

WASHINGTON, D. C.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The time within which the Supreme Court Advisory Committee on Federal Rules of Civil Procedure will receive suggestions from the bench and bar about amendments to the rules has been extended to *December 15th.*

Suggestions should be mailed to the Committee at the Supreme Court of the United States Building, Washington, D. C.

Additional printed copies of the pending proposals are available at the Committee's office in Washington.

EDGAR B. TOLMAN, *Secretary.*

OPEN FORUM
Fidelity and Surety Law

Chairman: HENRY W. NICHOLS, *Vice-President and General Counsel, National Surety Corporation, New York City*

DISCUSSION LEADER

E. KEMP CATHCART, *Assistant Director and Attorney, Claims, Bonding Department, Maryland Casualty Company, Baltimore, Md.*

THE Open Forum on Fidelity and Surety Law was called to order in the Berwyn Room of the Edgewater Beach Hotel, Chicago, Illinois, at 2:27 p.m., September 8, 1944, Mr. Henry W. Nichols, Chairman of the Committee, presiding.

CHAIRMAN NICHOLS: Ladies and gentlemen, we are pleased to welcome you here to this Forum of the Fidelity and Surety Section, and especially are we pleased to welcome Mrs. Hulen, our new lady member of the Association.

I thought that I might expound on this question and give you something worth while, but after having visited around at two or three cocktail parties before luncheon, I believe I am not in the best condition to do that. Also I should not encroach too much upon Mr. Cathcart's time. He has made a thorough study of this subject and is going to conduct this meeting for us in his own way. Kemp has prepared a very fine paper that was published in the Insurance Law Journal some time ago and taking that as a basis, he proposes to throw this meeting open as a forum. It that doesn't work successfully, he can go into his paper in detail.

This Assignment of Claims Act of 1940 is a very important subject to corporate sureties and if we are going into a period of prosperity after the war, with further financing on the part of private banking institutions, it is going to continue to be an important statute and an important topic.

It has set a new trend in the thinking of bankers, not only in connection with the financing of contractors on government work but in private work. Lending on government work may not be so necessary after the war as it has been during the war and no doubt bankers are going to try to have the benefits of assignments follow through in their financing of private industries later on.

When this statute was before the Senate Committee, I was consulted by one or two of the financial institutions in New York, and I told them that they would have quite a fight on their hands if they tried to put through an assignment of claims act that took away from corporate sureties their ancient rights of subrogation and what legal rights they might have obtained by prior assignments. An Act of a sort was adopted and now the contest is on.

This Bill, in the war emergency, went through both houses of Congress rather quickly and I think swept the surety companies off their feet. They were almost without representation in Washington at the hearings. The man that did represent the corporate sureties at the hearings was not an expert on contracts bonded by corporate sureties, and consequent assignments. I think the sureties should have paid more attention to the Bill before it became law, but the banks went to Washington with the idea of getting priority over everything else in having an Act such as this passed. They wanted an outright assignment of the contract funds. They thought they were going to benefit by an assignment that came in prior to all sureties' rights, and I think they hoped that they would get one to give them rights prior to the rights of everyone else. To what extent they succeeded in the Assignment of Claims Act that was passed in 1940, we are not able at the moment to say, because the Law has not become settled or crystallized. The Act is not clear and there have been few decisions. I think the Act fell far short of what the bankers intended. Since the Act was adopted I think the banks generally have not given as careful a study to it as have the corporate sureties. With the exception of a few banks that have become acutely interested because of large loans which they thought were unqualifiedly secured by assignments under this Act, not many of them have yet given the study to the situation that they should. The American Bar Association has given, I believe, more publicity and study

to it than has the American Bankers' Association.

Now, why a bank that lends money on very good interest, and sometimes other security, should come under an Act of this kind and take priority over other people, including corporate sureties, who may have to complete the work, I don't know. Corporate sureties are obligated by statute, or at least many of the bonds are required by statute, and we get a very modest premium, which isn't comparable oftentimes to the interest that a bank obtains.

Now, if the corporate sureties do not maintain the position that they have had in the past and permit the financing institutions to override their equitable rights of subrogation and their legal rights of prior assignments, then certainly the underwriters have got to change their views and raise their sights with respect to underwriting.

We have had a very acute example lately in which a number of the surety companies are involved, Mr. Cathcart's company, and my own company being the originating companies on a number of bonds where the banks loaned to the contractor, one and one-half million dollars on assingments taken pursuant to this Act. The contractor defaulted and is leaving bills that the sureties are obligated to pay in an amount comparable, or about $1,400,000. Remaining in the contracts is something over $1,000,000, about $1,100,000. Now, if the banks were allowed to prevail under the Assignment of Claims Act in a sitaution of that kind, you can see what happens. The $1,100,000 remaining in the hands of the government, payable on completion of the work, would go to liquidate the loans by the banks and the sureties would be left holding the bag.

In that particular case, we decided that discretion was the better part of valor. We sat down in New York in a three-day conference with the banks and made what we think is a very fair division of the funds and saved probably several years of litigation that would have gone up to the United States Supreme Court. But that can't always be done, and some day, sooner or later, a decision is coming down favorable to the banks and adverse to the sureties, or vice versa, as a result of this statute, unless the statute itself is changed. But having tasted blood, I think the banks are going to try to have this statute work in their favor and may seek amendments should the cases continue to come down favorable to the sureties, as they have in the past. The majority of the precedents, and it would seem the equities in the situation, favor the sureties.

I am particularly pleased that we have Francis Holt from Jacksonville, Florida, here with us today, because two of the most interesting and annoying decisions from the corporate surety point of view have arisen in the Fifth Circuit in Florida and he is counsel in both of these cases. In one, the Town of River Junction, he was beaten and has left a decision that has been rather unique because it is against the weight of authority in all the other jurisdictions and is at least to some extent against the sureties. He is also in a new case now, the Martin case involving the New Amsterdam which looks like it may take the sting out of the earlier case. I won't elaborate further on that. I will let Mr. Cathcart and Mr. Holt do that.

Now, I think I have spoken long enough, but having been interested in this from the first, I have been very much interested in trying to build up a record of such laws and thoughts as surety lawyers may have on the subject. In 1941 I was instrumental in having Major Allan Wight of Dallas, Texas, deliver a paper on this subject before the American Bar Association. That paper has been printed in pamphlet form, has been available and widely distributed and it has been helpful.

Subsequently, at my suggestion, Mr. Kemp Bartlett invited Mr. McCann of the Fidelity and Deposit Company to speak before the American Bar Association, and he gave some additional thoughts. Next week, here in Chicago, Major Allan Wight is going to deliver a second paper—what he calls his "second effort"—on the same subject.

Mr. Cathcart gave to the Insurance Law Journal some time ago a very excellent paper, which caused me to invite him here and take the lead in this forum today, so we now have three or four very good papers and have assembled some very good ideas and I hope that after today we will have a few more of those ideas.

With that, I will introduce the leader of our Open Forum, an associate of mine in the corporate surety business for twenty years and whom I am glad to have as a close personal friend. Kemp Cathcart I believe is one of the very best claim attorneys, particularly contract claim attorneys, that there is in the business and I take great pleasure in presenting him and asking him to take the meeting up from here. (Applause.)

MR. CATHCART: Mr. Chairman, ladies and gentlemen:

Henry, I feel something like my first case in the practice court. My colleague and myself were sitting there and we had our papers all set out in front of us and he was first and I was second. We were scrambling around and he picked up some papers and started off, and by gosh! when I looked over the table, I discovered he had my papers. Well, there I was.

First, I would suggest we consider the purpose of the Act, or really the amendment to the Act of 1908.

It is my opinion that it was the purpose of the legislature to take banks, trust companies, or other financing institutions, when financing contractors, out of the class of unsecured creditors and put such banks, trust companies, and financing institutions in a preferred position; this to be accomplished by recognizing and validating assignments taken by such banks, trust companies, and financing institutions of moneys due or to become due by the United States, including any agency or department of the United States to a contractor.

There is no obligation on the banks, trust companies, or financing institutions to safeguard the disbursement of the funds loaned by the financing institution and secured by the assignment. The contractor can use the money to send his wife to Europe or buy his sweetheart a fur coat, or both, and the assignment will still be valid and recognized by the United States.

Such assignments will even take precedence over any claim by the United States against such contractor which arises independently of the contract under which such money becomes due.

Therefore, it must be admitted that this is indeed extremely favorable legislation for the financing institution.

As stated, it places the financing institution in the preferential position of a secured creditor of the contractor, and thereby accomplishes the further purpose of the Act of facilitating financing of the contractor.

The next point I would like you to consider for discussion is whether the position of the surety has been affected or changed by the Act. Please let me emphasize the exact wording of this amendment, or so-called "Assignment of Claims Act". The exact wording is in part as follows:

"The provision of the preceding paragraph shall not apply in any case in which *the moneys due or to become due* from the United States, or from any agency or department therefor under a contract * * *"

It is elementary that a contractor, or anyone else for that matter, cannot assign more than he possesses. This amendment merely repeats this elementary principle when it says "money due or to become due", and to such moneys the amendment unquestionably elevates the financing institution's position by validating and recognizing an assignment to it and makes the financing institution a secured creditor.

This would be serious for the surety if it was dependent upon the contractor for its security, but the surety in its claim to such moneys is not dependent on the contractor, because its rights stems from the United States and the laborers and materialmen.

I will go so far as to say that until such moneys are actually paid by the United States to the contractor, or his assignee upon default of the contractor, the United States is entitled to use such moneys to fulfill the contract, and consequently the surety, by reason of its right of subrogation, is likewise entitled to such funds.

I make this statement with full knowledge of the decision in the Town of River Junction case, and in spite of such decision, for the following reason:

This Act says in part, "Such payment shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract." If the contractor defaults. any claim by the United States or laborers and materialmen because of such default would, of course, arise from such contract and fall within the exception set forth in the Act. Therefore, the United States at least would set off its claim against such moneys due or to become due the contractor, and the surety would be entitled to the right of subrogation, and by reason of such right, to the said moneys.

The third and last point I would suggest for discussion is the reason the Act requires the financing institution to give written notice to the surety.

This notice is of the utmost importance to the surety to enable it to protect its position as surety should it learn of acts by the contractor constituting a default under the contract before such contractor is actually declared in default by the United States.

For instance, the creditors of the contractor

do invaribly notify the surety whenever the contractor is slow in paying them. Such nonpayment of bills constitutes a default under the contract.

Investigation by the surety at that time might disclose the contractor is financially involved to the extent that it immediately becomes necessary to safeguard and protect the contract balances for use in the fulfilment of the contract.

With notices before it that such balances have been assigned to a financing institution, the surety knows it must act immediately. It must at once assert its claim of subrogation and take suitable action to prevent further payment to the contractor or his assignee.

This reasoning follows my opinion that it was not the intention of the legislation to change the position or rights of the surety, but to safeguard them. After all, the surety does occupy an important place, because upon failure of the contractor the United States looks to the surety to fulfill such obligation over and above any contract balances to within the limits of its bond.

The facts in the California Bank case drive home this point. The surety's failure to act enables payment by the United States to the contractor and by him to the financing institution, all to the detriment of the surety.

Although I do not mean that this discussion shall be limited to these three points; I mean only that they are the only ones I have to suggest, and I shall be pleased to hear your comments.

What I would like to have at this time, just stopping at that point, is the reaction of the gentlemen here to the purpose as I have outlined it, and any other purpose that they have in mind. I am going to try to conduct this meeting in sections, taking up the points that I have in mind and then following through with the points that you may have in mind. Do any of you have any thoughts concerning the purpose in back of this legislation? Mr. Holt, have you any thoughts?

MR. HOLT: Mr. Cathcart, it seems to me that under the provisions of the Act of Congress as amended prior to the 1940 Act, it being impossible for a contractor to assign any right under a contract with the United States Government, he was of course in a position where he would either have to have independent resources wherewith to finance his operations or else he couldn't carry on, and I think the purpose of it was to make it possible for contractors of lesser financial responsibility to be able to finance their work as it went along by validating the assignment to a lending institution, a financial institution, in the limited sense that it is defined in the 1940 Act. It seems to me that that is made abundantly clear when one reads the proceedings before the Committee, which I believe Mr. Starling represented. I think it was the Association of Casualty and Surety Executives.

MR. CATHCART: That is correct.

MR. HOLT: Those proceedings have of course been reported and doubtless most of us have access to them and read them, and the discussion that took place before the Committee makes it seem to me crystal clear that that is all that the Act contemplated. That discussion developed the thought that there was no intent to give to the assignee bank any greater rights to place the bank on a higher level than that upon which the contractor himself rested, but merely that he could create a legal right, and a single legal right, by virtue of the provision that there could be only one assignment; and if we have reached that point in these discussions, I will look forward to commenting further upon some other features of that, but that its real purpose was only to breathe life into the legal assignment that could have no validity before unless the money had become actually due and payable and a warrant issued for it, which, of course, meant that he might endorse the negotiable instrument and cast it. That, in the particular case in which I am so deeply interested now, is one of the fundamental points upon which I shall rely.

MR. CATHCART: There was some thought that this Act was passed primarily at the instigation of the RFC and the various war departments as a result of the V-loans, etc. Have you any thought concerning that?

MR. BEECHWOOD: I would suggest one thing. I wasn't going to say anything about it but there is one particular instance in which one of the older shipyards in this country, the government was in the position of wishing to rehabilitate that shipyard and it necessitated borrowing upwards of one hundred million dollars, and it is my understanding that one of the big things in back of this Act was that one particular situation, that, together with others, but that was one of the larger ones that they had in mind. I am not at all certain that the thought back of it was to be a permanent piece of legislation.

MR. CATHCART: Was this primarily to help the private banks or was that a governmental agency?

MR. BEECHWOOD: No, no, it was private people raising the necessary funds and giving the proper assignments to the banks in order to raise the funds to rehabilitate the shipyards, and that was done through financing of the banks and the RFC, and I know definitely that this one question is one of the big things that they had in mind when this Act was passed.

MR. CATHCART: Well, you think that it was principally to help the lending institutions rather than the RFC or the War Department and its guaranties?

MR. BEECHWOOD: Oh, definitely.

MR. CATHCART: I have noticed in reading the papers and the histories in back of all this that there has been some mention that the various departments wanted some help; although I had felt that probably it was primarily to help the private institutions, at the same time I thought that that should be covered.

MR. WEICHELT: Mr. Cathcart, in following that Act, my understanding was that it was promoted by the various bureaus and departments in order to enable more contractors to engage in necessary work. At the time that that Act was suggested, as I understand it—and, of course, mine is only second-hand information—there was a greater demand for work than there were contractors with sufficient financial backing to undertake the work, and the Act really was to give the financing institution a right comparable to the mechanic's lien rights that they would have on private buildings. The work was being spread out and going out so fast and the demand was so great that there weren't enough responsible contractors to undertake it, and we here in Chicago had several contractors who couldn't bid on the jobs because they couldn't get the backing. A contractor would get a job for a million or two million dollars. We had here at Great Lakes some $111,000,000 worth of contracts and those contracts were let because of the emergency coming on, with demands being made immediately, and no finances. The banking institutions, of course, realizing the hazards and the fact that the claim was unearned until it was determined it was not assignable would not back up the contractor financially beyond what their quick assets and visible assets justified, and the RFC and later on the War Plant Corporation and others, while they urged the passage of this Act and appeared before the committees, it was not so much for the protection, as I understand it, of the financing institutions that they were interested in as it was to open a wider field for contractors to undertake the necessary construction work. That is the impression that I got. There is nothing definite on it but I think that that was one of the motivating spirits.

MR. CATHCART: Do you have the same thought that Mr. Beechwood has, that it was a temporary piece of legislation?

MR. WEICHELT: No, I don't. I think it will be a permanent piece of legislation, from the point of view that, as we all know, when we get a piece of legislation on the books, it is going to be a difficult task to overthrow it. It may be amended. I think it should be revised so that the sureties have ample and suficient notice, but I doubt very much whether it will be temporary. I think it will be continuing, although it may provide that the sureties have notice of such assignments and certain rights given in the event such assignments are made. I think that not only should there be notice to the surety but I think at the same time that the surety should be given a right to withdraw from its obligation in the event that it was not satisfied with the assignment. In other words, the money that is assigned goes into the project, but I don't believe it is ever going to be wiped out. I think that the financing of a government project is going to be considered in the light of the same rights that the contractors on private enterprises have on government buildings. Not only that, but I think it is going to be broadened to include financing on state and municipal subdivisions. But I do believe that it should be amplified so the surety knows what is going on and has a right to withdraw in the event the assignment is made, or some provision made, something similar to the relieving itself of obligation on a fiduciary bond, by a prescribed notice. In other words, if the surety doesn't want to continue on a contract and it can't finance itself, he must secure another bond, if necessary, but I doubt very much whether it will ever be—and I look at this because I have followed it historically from its inception, and I think the reason for the passage of the act and the reason that the various governmental institutions are interested in and promulgated and en-

couraged it a great deal was their desire to have more available contractors in the event of a need, which developed, of course, after the passage of the act; that we had to have a lot of contractors going into construction work. I think that was the reason that the governmental institutions were interested in it, to make more contractors available.

MR. NICHOLS: I will just elaborate on one point that hasn't been touched upon. I think, too, the banks were full of money and many of the contractors that needed money were running to the RFC, because they were having difficulty in getting loans from banking institutions. It was the desire of the government to help free the money in the banks; to do something that would make the money in the banks a little more available to contractors and not have so many of them going to the government. I think in a sense it started out as an emergency or a war measure, but I do think that the way the statute has been put upon the books and the way the thinking has developed, it now has become a permanent proposition.

MR. CATHCART: Mr. Weichelt, was it your thought that there would be a trust fund created by amendment?

MR. WEICHELT: No. My thought on the amendment that should be put through, and I think it would be the only fair one, if a surety signs a bond for a government contract, the surety has a right, of course, to expect that that money will be available without assignment, and I think that the amendment should provide for an ample notice to the surety and the right to a surety to relieve itself from its obligation in the event that the contractor can't carry on alone.

MR. CATHCART: That was the primary purpose, I believe, of the act in 1933, and that Act, as I remember it, actually created a trust fund. That was not very popular.

MR. WEICHELT: No, and I don't think it will work out, but I think the surety should be given a right to determine whether it shall continue on its obligation if the contractor finds it necessary. One of the reasons for that is, a contractor may show a very good financial statement and be very well equipped to carry on a particular project, but in an emergency he spreads out and gets a great deal more work than his financial standing and his financial structure will justify. Then, by making assignments, he can put himself in a very weak condition. I think that the surety should insist that when there is thought of any amendment to it, or should insist that an amendment is made, not only of notice, but to give the surety a chance to relieve itself of its obligation if a contractor finds himself in such a situation. I have known of one case where a contractor wouldn't perhaps have sufficient financial standing to finance a $100,000 contract. He got to where he was carrying nine million dollars' worth of contract work on his books. Well, now, I think the surety should, where it signs a bond for a contractor to carry on a project, be allowed to relieve itself from its obligation in the event the contractor assigns future payments.

MR. CATHCART: The reason I wanted to emphasize or get before us the purpose at this time was, after we had the purpose in mind, to see just how the Act, keeping in mind its purpose, affects the surety.

MR. WEICHELT: I might say supplementing that, I talked to Congressman Church about that Act and he said that was just his expression, he said, "Well, why shouldn't those contractors or material men and others and financing institutions have the same right on government contracts that they do on private buildings in the form of a mechanic's lien?" He said that was one of the arguments that was brought up. But we can readily see, with the privilege of assigning contracts, a little contractor that has no business taking more than perhaps a $50,000 or $100,000 job, who, by assignment, can go into the millions. The surety may not want to continue then and they should be given free exercise of the right to determine whether they want to continue with a man that finds it necessary to make assignments of his contracts. They may be willing to go along with a man for a $100,000 contract where he may have an organization that is equipped to carry on a small contract, but where he spreads out and goes to the banks and borrows and assigns future payments, he may become a very dangerous risk.

MR. CATHCART: Keeping in mind the purpose and considering the effect, I would like to emphasize the exact wording of the Act in part, which is as follows: Its only purpose is to apply to, using the words of the Act, "moneys due or to become due." Now, that seems to be very clear, that the moneys due the contractor, or to become due the contractor, is the only thing assignable.

Now, then, we get back to what can be due

or become due, and unless it is due or can become due, it would not be assignable. Now, the surety's position I don't think is dependent on moneys that are due or becoming due the contractor, because the surety's rights start at the time of default and, of course, they date back to the date of the contract, but the thing that puts the surety's right in operation is the default by the contractor; and when he defaults, necessarily there is nothing due or to become due until the contract has been completed and the bills have been paid and it has been determined whether there is a balance in excess of the cost of completion and the payment of the bills. Therefore, the Act says "money due or to become due," and at least I grant that the bank can secure a good assignment and I say that if the surety was dependent upon its right of assignment, it would be in a pretty bad position, because I do not think its right under such circumstances would be superior to that of the bank. I hope I have made that clear, but my thought is that the right of the surety stems from the United States by way of subrogation and not from the contractor.

Have you any thoughts concerning that point?

MR. CROSBY: Mr. Cathcart, there are two theories on this point. One is that the rights of the surety stem from the assignment; the other, that the rights of the surety come by subrogation from the rights of the labor and material claimants who seem to have an equitable lien on the money. We ought not lose sight of that. Under the assignment theory, of course, the surety claims its rights relate back to the date of the execution of the contract and bond, whereas under the equitable lien theory, the surety's rights are derived from the labor and material claimants. I think we must keep that in mind. There has been some confusion on this subject. I have discussed it with several parties on that matter, the rights of the surety under his assignment contained in the so-called indemnity agreement.

MR. WEICHELT: On the indemnity agreement, I don't think there is a great deal in that, but I think that that right of the surety is pretty well defined in the case of Martin vs. The National Surety, 85 Fed. 2nd. While it is on another issue, I think it defines the right of the surety pretty clearly.

MR. CATHCART: I purposely have said that the right stems from the United States. I purposely left open the subrogation of the surety's rights to the right of labor and material, hoping that someone would bring up that point. Now, then, I think that the United States Supreme Court, as I remember the decisions, has held that the material and labor men do have an equitable lien and they feel it is their duty to see that they are paid and have further held, I believe, that the surety's interests are subrogated to such rights; so I could say really that the right of the surety not only stems from the United States but also stems from the equitable right of the labor and material men.

Mr. Beechwood says No, and I would like to have him elaborate.

MR. BEECHWOOD: I think the Supreme Court in the Hennigan case, I think it is 201 United States—and they haven't changed from that decision—clearly says that the surety's rights on the theory of subrogation, or whatever rights they discharge that the United States has, says that what the surety discharges, if they discharge the obligations which the United States would have, first the United States would have the right to complete the contract; so if the surety undertook and performed what rights the United States has, they would therefore have the right in the fund the same as the United States as the original party to the contract. Then, they go further and say that the United States has an obligation to pay the labor and material men. Then they say, if the surety discharges the obligation which the United States has, then the surety is subrogated to the rights of the United States against the fund; but they have never said that the labor and material men themselves have a right of lien or that the surety, through the labor and material men, has a right of subrogation in those payments. It is, the subrogation goes to the federal government, the United States government, and does not go through the labor and material men.

MR. WEICHELT: I don't think that the government is liable for labor and material bills.

MR. BEECHWOOD: The Hennigan case says so.

MR. WEICHELT: They say so, but I don't think they mean it, if you read it closely. There would be no chance for a labor and material man to recover against the United States. They have no legal right under the Miller Act or anywhere else. They could only

come in by a superior right to that of the contractor.

MR. CATHCART: It is true their right is not legal.

MR. WEICHELT: It is a moral right more than anything else and I think that it is what the Hennigan case implies. It is an equitable right.

MR. CATHCART: The advantage of being in this position is that I am privileged to make certain inaccuracies to provoke discussion, so any inaccuracy, George, you can assume that it is intentional. (Laughter.)

MR. BEECHWOOD: From our discussion this morning, I assumed that.

MR. CATHCART: Now, then, George, what do you think? If you remember the wording of the Circuit Court of Appeals decision in the Martin vs. National Surety case, as I remember it, the Circuit Court of Appeals did say that the labor and materials had such a lien, an equitable lien, against the funds. I think they almost use that plain language, or language as plain as that.

MR. WEICHELT: Oh, yes, that has been held repeatedly.

MR. CATHCART: Now, then, in the Martin case, after the Circuit Court of Appeals made this very broad decision, used this very plain language, I think it was to tempt the United States Supreme Court. The United States Supreme Court heard the case but, as they so often do, they just ran around a corner on that question and didn't pass on it as such. Am I correct in that, Mr. Crosby?

MR. CROSBY: I am not an authority.

MR. CATHCART: Can anyone help me out there?

MR. BEECHWOOD: Well, I remember fairly well, I believe, what the Supreme Court said, or the result the Supreme Court reached, but I don't think that the statements, whatever the Supreme Court made, in any way affected the decisions or the line of reasoning and the foundation of the legal results which they had theretofore reached.

MR. CATHCART: I made a little note here. It is very brief. It reads this way: "Assignment valid as between the parties, although null and void as to the government." That was one of the important points in that Martin case, because up to that case, the assignments were held to be null and void not only as to the government but also as between the parties, and the Martin case did straighten that feature out. The question there involved the assignment to the National and Martin proceeded to beat the National to the ball by securing from the contractor instructions to the government to send the check to him. Then Martin also took a power of attorney to endorse and cash the check. After he secured these papers (National, Mr. Nichols' company, in the meantime, was sitting in New York with its assignment, thinking it was perfectly protected) from the contractor instructing the government to deliver the check to him, and the power of attorney, he went to Washington, picked up the check, endorsed it and deposited in his account. Then the fight by the National started.

MR. WEICHELT: But he was ultimately made to disgorge.

MR. CATHCART: That is correct.

MR. HOLT: Mr. Cathcart, is it not true that in the Martin case the Supreme Court specifically held that the surety's equitable right of subrogation did not violate the Act of Congress, as it then existed, forbidding assignments?

MR. CATHCART: Yes.

MR. WEICHELT: They said that specifically.

MR. CATHCART: As I remember the case, that was one of the important parts of the decision which stuck in my mind, and the other part of that case was the wording of the United States Circuit Court of Appeals.

I don't think we really have reached the controversial part of this thing. I have made a note here, gentlemen, which reads this way: "I will go so far as to say that until such moneys are actually paid by the United States to the contractor, or his assignee upon default of the contractor, the United States is entitled to use such moneys to fulfill the contract, and consequently the surety, by reason of its right of subrogation, is likewise entitled to such funds.

"I make this statement with full knowledge of the decision in the Town of River Junction case, and in spite of such decision, for the following reason:

"This Act says in part, 'Such payment shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.' If the contractor defaults, any claim by the United States or laborers and material men because of such default would, of course, arise from such contract and fall within the exception set forth in the Act. Therefore, the

United States at least would set off its claim against such moneys due or to become due the contractor, and the surety would be entitled to the right of subrogation, and by reason of such right, to the said moneys."

Now, then, the Town of River Junction case created a snarl at that point, in that it attempted to distinguish between moneys due or to become due. Now, Mr. Holt—incidentally, that was a case of the Maryland Casualty Company—Mr. Holt was their counsel, representing us in the case, and he tried the case for us. I hate to say this publicly but he lost the case for us and I think it is fitting and becoming now that he should explain not only to me, but to the rest of us, just how that case was lost. (Laughter.) Would you mind coming up here and explaining that situation, Mr. Holt?

MR. HOLT: It only proves that the alibi is a wonderful institution.

MR. CATHCART: Of course, if we didn't have the highest regard for Mr. Holt, I wouldn't presume to have made such a statement.

MR. HOLT: Mr. Cathcart and gentlemen:

In the River Junction case, I think it is important first to bear in mind that that case did not involve the Assignment of Claims Act, because the contract was not with the United States government but was with a municipal corporation in Florida, the bond being the usual bond in such cases required by the statutes of Florida in contracts for public works, so there was no question of the Assignment of Claims Act in it.

As I stated informally, I won that case twice before the District Court and lost it twice before the erring majority of the Circuit Court of Appeals. I have the further support of the Harvard Law Review and the Michigan Law Review, both of which agree with Judge Hutchinson and with me. But that still doesn't do us any good.

The point on which the River Junction case really went off was this. In the first appeal, the Circuit Court of Appeals reversed the lower court because, upon motion of the surety, defenses asserted by the bank, the lending bank, and the town were stricken out, which defenses set up that in point of fact, the moneys loaned by the bank were actually used to discharge obligations for which the surety was liable, namely, the payment of sub-contractors and material men, and that was the basis of the reversal on the first appeal.

The bank then came in and adduced evidence to show, and did establish without contradiction, that the moneys were actually so used. Those funds were traced from the actual loan to the credit of the contractor in his deposit account and cancelled checks and other records were produced to show that those moneys actually relieved the surety of a burden that it would otherwise have had to bear in suits brought for the benefit of the sub-contractors and the material men, and it was upon that equitable doctrine that the court held that one using his resources for the benefit of another was entitled to equitable subrogation which was of a higher degree than the status of the surety depending upon the assignment that was incorporated in the indemnity agreement that is a part of the application for the bond; and that was the particular point on which Judge Sibley of the Fifth Circuit grounded his ultimate holding that the bank was entitled to that money, and unquestionably in that case it was true; the surety got the benefit of the funds that were loaned. The contractor was insolvent at the time of the loan, had no resources of its own. It was a corporation that was just on the verge of becoming defunct and had the bank not loaned the money, the loss of the surety would have been increased by just that amount.

MR. CATHCART: That case, Mr. Holt emphasized that when money is due the contractor, the court will consider the money the same as paid. In other words, they attempted to apply, or did apply, as a matter of fact, the equitable principle that equity should require that as done which ought to have been done.

MR. HOLT: That is correct, sir, and there was one other feature. At the time of the assignment to the bank and the actual loan by the bank, there had been accumulated in the contract or in the hands of the municipality, sufficient funds in addition to the retained percentage to reimburse the bank, and that was another of the factors. So I think that case can be clearly distinguished from the legal right of the bank by virtue of its assignment, as compared to the equitable right of the surety under the equitable doctrine of subrogation that is recognized in the Martin case.

May I take this opportunity to comment on one thing that Mr. Weichelt said? I do

not see how a surety, having once signed the bond, would be permitted by the governmental authority, whether it be the United States government or any municipal or other public corporation, to be relieved of its obligation on the bond, at least so far as performance is concerned, and I just don't think they would ever turn you loose. When you sign and deliver the bond, it seems to me that the ultimate liability is fixed there and it would be a grand thing if there were some way of changing our minds, but I am afraid that isn't possible.

MR. WEICHELT: Why, I didn't think it was possible under the law. I thought that it should be made possible by legislation. I can go into that quite at length if you want me to. It sounds, offhand, like it couldn't be done, but what I had in mind is where you sign a bond for a contractor, expecting to carry him on, and he spreads out so far on the theory of assignments, on the right of assigning his future payments, that he gets beyond what he was when you bonded him. Under those circumstances, the surety should be in a position to get off of it. It would have to be done, of course, by amending legislation.

MR. BEECHWOOD: Does Mr. Weichelt mean for any liability which has arisen or for any future liability?

MR. WEICHELT: Future liability.

MR. CROSBY: On the subject that Mr. Beechwood brought up, he brought out one point and I want to bring out another, that these loans that are made by banks are not always made at the inception of the contract. The practice has been in many cases for the contractor to negotiate a loan at the time or shortly after the time of making the contract, but there are many other cases where a contractor has negotiated a loan after he has gotten into trouble and after the work has been, we will say, 50 per cent or more completed. Now, in that situation, there are liabilities arising on both bonds, on the performance bond and on the labor and materials bond, and nobody can determine what that liability is and I am afraid the first surety, on the performance and payment bond, would have extreme difficulty in securing a release of liability, and particularly on the labor and material bond.

MR. CATHCART: Difficulty in what way, Mr. Crosby?

MR. CROSBY: As to liability. Here is a sub-contractor, we will say, performing work. Well, what is his liability? What are his ultimate claims? How are you going to measure that? It is going to be difficult. He is connected with parties that supply materials. They supply material before and after substitution of the surety.

MR. CATHCART: Was it your thought there would be a substitution of surety, Mr. Weichelt?

MR. WEICHELT: My thought was this, that there could be no redress or relief from liability that had accrued, but let us assume, as Mr. Crosby said, that the contract is 50 per cent complete. The surety, without the assignment, without the right of assignment of the retained percentage of the amount earned on the progress payment that hasn't been made, is entitled to all of that security for the discharge of the liability it may have incurred up to that point. Now, if the right is given to the contractor to assign what is due and what may be due, the surety should have a right to say whether he should go on, whether he would be a risk to carry on, regardless of what is due. They can't relieve themselves, of course, as we all know, from that which has accrued and that which the surety is liable for, but the surety shouldn't be compelled to continue with a contractor who assigns his retained percentage, who assigns that which really comes due to the contract for any reason at all. He may not be considered at that time a contractor who is competent and capable of carrying on. In other words, it is to prevent the assignment of the retained percentage in those funds that the surety has a right to have as security for any indebtedness that may be incurred. I think that something on the question of notice could be worked out on that. What brought it to my mind was what we find contractors assigning claims do. There is a bridge company case here that is in that very situation. It couldn't undertake other work except for the fact it relieves itself of the obligations on the continuing contract by way of assignment. It spreads out too far. It is a question of underwriting more than anything else, whether the surety wants to continue it, but I think they should be given that right. In other words, the contractor's status has changed the moment he assigns rights, is allowed to assign rights in funds; his status has changed entirely from that which the surety assumed and the surety should not be compelled, by virtue of the right of assignment, to continue, just as we

have in practically all the states the right of a surety to relieve itself from the fiduciary bond by proper notice, etc. It doesn't relieve itself of the right to complete the contract; it doesn't relieve itself of the right to re-let the contract, but it should not be compelled to continue on that obligation where the contractor changes the status which the surety assumed.

MR. BEALS: I am getting my bread and butter from an insurance company and I shouldn't be trying to damn it to the advantage of the bank. I find myself, though, disagreeing with Mr. Weichelt, but also agreeing with him on one point. Recently, I found myself in the enviable position of a contract loss of $87,000 down in Greenville, South Carolina. Three banks loaned them $155,000, every dollar of which went right square into that contract, and had it not been for the banks, our loss would have been $87,000 plus $155,000.

Surety companies are kept in the contract business primarily because of the labor and material protection, and I do not favor anything that minimizes the protection a surety company affords. However, I do not favor giving the banks—

MR. CATHCART: Is this for the record?

MR. BEALS: I am not going to make it too bad.

I would say that a surety company ought to have some control over the extent to which a contractor may go in assigning funds due on the contract on past-due indebtedness or indebtedness which he may wish to use on that contract or, as in a recent case we had, where a perfectly solvent contractor bought out a shipyard and was using all his corporate funds in the shipyard, an entirely new venture. I would suggest the solution is to provide an amendment to the Act, or an agreement in the contract or in the bond, or with the banks generally, that when an assignment is given subsequent to the execution of the contract and bond, the surety company shall have the right to enter into a joint control arrangement with respect to that loan and that the surety company's rights are minimized or the surety company consents or has knowledge of the assignment only if it shall have the right to make sure that all funds loaned to the contractor shall be used exclusively on the contract, because what is happening nowadays in a great many cases is that the surety is being held to the disadvantage of the bank, and all the surety company should expect is to make sure that what loans may be made to the contractor shall be used in the discharge of the obligation which it has bonded and the bank repaid out of funds on that obligation only.

MR. CATHCART: Of course, from a surety standpoint and the bank standpoint, I do not think that surety coverage should be thought to be extended to cover bank loans.

MR. BEALS: I agree with you.

MR. CATHCART: The discussion on this Assignment of Claims Act is important. When you read the thing, it seems elementary that the surety's position has not been changed and you wonder, "Well, why all these papers and why all the discussion and everything else about it, if the Act is so plain?" Well, the reason we are discussing it and the reason it is important and timely is because of the opinion in the Town of River Junction case, first; and second, because of the interpretation placed upon it by the banks. and third, because of the recent decisions of the comptroller's office, which have been unfavorable to the sureties. The combination of those three things I think make it important for us to wonder where we are going, because it runs into hundreds of thousands of dollars, and maybe millions.

Now, then, the Town of River Junction case is important, Mr. Holt, from my standpoint, because it says that if the work has been done by a contractor and an estimate becomes due for the work that he has just finished, although the estimate has not been paid by the government, the courts will consider it as being paid and funds in the hands of the contractor, with which he can do as he pleases. That is the damaging point in that case and that is the only part of the case that is bothering me, and it bothered Mr. Nichols a whole lot not very long ago. I see no basis for the court's strained reasoning in that case and, to me, it was strained. They certainly ignored completely the decisions of the United States Supreme Court, which the United States Circuit Court of Appeals should have followed, and the only way it could avoid these decisions and get around them was by applying the principle that equity should regard that as done which ought to have been done.

MR. FIEDLER: Mr. Cathcart, would you be willing to tell us, if you can, the arguments which the attorneys for the bank put forth to you and to Mr. Nichols before you

concluded your arrangements or settlement with them, if your case is so far out of the way that you can speak of it?

MR. CATHCART: It is very simple, if I have Mr. Nichols' permission to explain it.

MR. NICHOLS: You do.

MR. CATHCART: We had a meeting in New York at which the banks had their representatives present. Probably there were half a dozen bankers and half a dozen of their legal representatives. The sureties took the position that, "If we are going to talk about the law and the application of the law, we will continue talking all night, so let's compromise it, each side thinking as they want with regard to the effect and the interpretation of the law, and see if we can't dispose of it without arguing those points," because the banks were very definite in their interpretation that there were certain equities that affected them and the sureties were equally as firm that they did not affect them, and if we had started discussing the law and its interpretation, instead of reaching a settlement, the discussion would have continued for months. You can imagine just two lawyers talking law and its interpretation meaning hundreds of thousands of dollars to one side or the other and one of them agreeing to an adverse interpretation.

MR. NICHOLS: As a collateral matter, Kemp, there were several hundred thousand dollars' worth of salvage that could never have been conserved and distributed until after we had exhausted all of the legal problems if we had tried to thrash this out through the highest courts.

MR. CATHCART: That is correct, Henry.

Now, to follow along with this money that has been earned by the contractor in the form of estimate that has not yet been paid, we have a decision by the United States Court of Claims. That was a recent decision, in June of this year. That is the case—you may be familiar with it—of the Modern Industrial Bank. In that case, the fight was between the bank and the United States. An estimate had been earned which the bank claimed due and it had been passed upon by the engineers for the government but the government had not paid the estimate. After the estimate had been filed, the contractor defaulted. Then the government undertook the completion of the work and in undertaking the completion, it incurred losses or expenses that consumed most of the contract balance, though not all of it, and the balance that remained in the contract after the government had paid itself the cost of completion and had also paid itself, the engineers' expense was paid to the bank, but the bank contended it was entitled to the full amount of that estimate, some $21,000, and in the Court of Claims the bank cited the Town of River Junction case and attempted, as I remember the decision, to apply the ruling in that case. But the Court of Claims, without specifically passing upon that, simply said, after it had set forth the bank's contention, "Our opinion is indicated in the judgment," and the judgment was for only $7,000 and not for the amount of that estimate. So that is the way the Court of Claims passed on it.

You can see the importance of the decision in the Town of River Junction case until it has been corrected.

Now, the banks' position is very evident in the claims that they are making against the National, or did make against the National, in the so-called Newton cases, and the opinion of the comptroller general is very evident in the last two decisions, one of them involving the New Amsterdam, Mr. Denmead's company, and Mr. Holt is likewise the attorney in that case.

MR. DENMEAD: He won that case.

MR. HOLT: So far.

MR. CATHCART: Gentlemen, Mr. Holt won that case before the District Court, but he is before that same United States Circuit Court of Appeals that decided against us, so I don't know what they are going to do now.

The next point that I have here is the one of notice. This notice is of the utmost importance to the surety to enable it to protect its position as surety should it learn of acts by the contractor constituting a default under the contract before such contractor is actually declared in default by the United States. For instance, the creditors of the contractor do invariably notify the surety whenever the contractor is slow in paying them. Such non-payment of bills constitutes a default under the contract. Investigation by the surety at that time might disclose the contractor is financially involved to the extent that it immediately becomes necessary to safeguard and protect the contract balances for use in the fulfillment of the contract.

With notices before it that such balances have been assigned to a financing institution, the surety knows it must act immediately. It must at once assert its claim of subrogation

and take suitable action to prevent further payment to the contractor or his assignee.

This reasoning follows my opinion that it was not the intention of the legislation to change the position or rights of the surety, but to safeguard them. After all, the surety does occupy an important place, because upon failure of the contractor, the United States looks to the surety to fulfill such obligation over and above any contract balances to within the limits of its bond.

Now, then, you can see in the California Bank case the importance of that notice. If I remember the case, the bank had an assignment. An estimate became due, was paid. The contractor was in default yet, by reason of non-payment of bills, the estimate was paid to the contractor and by the contractor to his bank. Then the surety attempted to recover and they were unsuccessful, and I think rightly so, because after the fund gets in the contractor's hand, it becomes the general funds of the contractor and I think he can do with it as he pleases. As far as I know, a trust is not imposed upon the fund and unless such trust is imposed, I don't see how it would be possible to follow it after the estimate had been paid.

The importance of the notice is also emphasized in the Modern Industrial Bank case. In that case, the surety was notified, but it knew the bank was claiming the contract balance and it was probably better to waive its right to complete the contract and let the government finish it and use the funds in its hands to reimburse itself rather than to call upon the surety, and, as a consequence of that, it left the scrap between the bank and the United States instead of the scrap between the bank and the surety. Now, then, if the surety was not acquainted with the assignment, it could have undertaken to finish the job and then had a battle with the bank about who was to get the money, but certainly the easiest way was to waive its right to complete and let the United States finish and use the balance of the contract to reimburse itself and, of course, then the battle was between the United States and the bank.

Mr. Holt, do you have any further thought with regard to notice? I think you mentioned it.

MR. HOLT: I don't like to be on my feet so much. I should much rather learn from these other gentlemen. But in the New Amsterdam case to which you adverted a moment ago, the surety made this particular loan, I think just two days before the contractor was known to be in a state of default. The assignments had been taken some five months prior to that time and it was not until then, after a lapse of five months, that the surety was first notified that the bank held the assignment. The governmental department, in this case the Farm Security Administration, was notified promptly when the assignments were given, but, in the opinion of the comptroller general, the delay in giving the notice to the surety made no difference.

Immediately upon receipt of that notice, the surety rejected the notice, so to speak, or rather, returned the copy of the assignment and said that it would not accept the notice but would stand upon its rights already accrued, but that was entirely brushed aside by the comptroller general, who said that the provision in the Act for giving notice to the surety was merely procedural and did not affect the validity of the assignment to the bank.

That, of course, for the reasons Mr. Cathcart pointed out a moment ago, always works a very great hardship upon the surety because of its ignorance of the condition, and in this particular case the surety did not know that the contractor was in trouble until it received the notice of assignment from the bank when, as a matter of fact, they had already accrued many, many thousands of dollars of unpaid material bills for which the surety was already liable by virtue of its payment bond, and which it ultimately had to pay, with the result in that particular case that until the surety had put I think some $200,000 into the job for the completion of the work and the payment of material men, from each of whom, by the way, the surety took the precaution of taking assignments of the material men and the sub-contractors' claims against the contractor, but until that money was poured into the job, nothing further became due to the contractor; and, taking literally the language of the Act, "moneys due or to become due," it seems to me that that emphasizes the importance of the notice to the surety, because the money that the government ultimately paid to the bank and for which we now hold a judgment that is on appeal to the same Fifth Circuit Court of Appeals, it is our money that went to the bank and there would have been no fund, nothing ever become due to the contractor except out of the surety company's money.

MR. CATHCART: The reason I raised the question of notice as important and have given you my opinion for the reason of the notice is because the banks have taken the position that if it was not the intent of the Act to subordinate the claim of the surety, why would the Act require the surety to be notified? What purpose would there be in giving the surety notice if its position had not changed?

Now, of course, that point has not been decided. That will still be before the court and will be decided later. I don't see how the court can accept that interpretation but the argument has been made and I do not think we should overlook it. I have attempted to answer it in what I have said. I am not sure how complete the answer is.

MR. CROSBY: Assume for the moment the assured does get notice. What can he do about it that is going to protect his rights?

MR. BEECHWOOD: May I amend that question to ask, What does the law impose upon him to do

MR. CATHCART: As to the first question that was asked, what can he do about it? —we have signed a bond; the bond is not cancellable and there is nothing we can do about it. (Laughter.)

MR. CROSBY: Then why talk about it?

MR. CATHCART: Now, then, what was your question, George?

MR. BEECHWOOD: My question was really, supposing the surety does receive the notice, which you say they want? After having received that notice, is there any obligation upon the surety to take affirmative action then and there to protect his rights? In other words, what waiver of rights would be flowing from the notice?

MR. CATHCART: I should say legally, no, but under the administrative practice, I don't know.

MR. CROSBY: I should like to know what action the surety should take after it receives the notice. It cannot step in and complete the contract, because the contract, of course, is between the government and the contractor. I don't know. I am open for some light and information and advice on that, as to what the surety can do.

MR. WEICHELT: He can do nothing under the present legislation.

MR. CROSBY: There is nothing in the law, no action the surety is obliged to take to protect himself. What can he do? I don't understand what he can do.

MR. CATHCART: George, why do you think the Act provided that the surety be notified?

MR. CROSBY: I am sure I don't know. I don't see any purpose in it.

MR. CATHCART: I asked that question because the surety's position cannot be affected by the notice and therefore I can see no purpose in that requirement other than the reason that I have just advanced.

MR. DENMEAD: Mr. Cathcart, don't the sureties now, when they get the notice and they propose to sign the acceptance, try to qualify their acceptance with a clause reserving all the rights, etc.? Do you think that is worth anything? We do it, but is it worth a darn?

MR. CATHCART: I don't think it changes the position any more than if they simply acknowledge the notice. I can see no harm in that, but by adding a number of qualifications to your acknowledgment, I don't think it changes our position or helps our position. I think it leaves them in identically the same position they were in before notice was received.

MR. DENMEAD: We have had some arguments about the value of it. That is the reason I was wondering how you felt about it.

MR. CATHCART: Have you any thought, Mr. Fiedler?

MR. FIEDLER: No, not on that point.

MR. CATHCART: Well, on any point. (Laughter.)

MR. FIEDLER: Here in 1940, there was a meeting of quite a number of Chicago lawyers gathered to hear a paper read by one of the senior attorneys in one of the largest banks in Chicago on the Assignment of Claims Act of 1940, in which he tried to set forth the attitude of the bank and of the attorneys for other banks with whom he had been in conference. As I recall his outline of their view of it, he said that the banks had been approached by a great many contractors for loans and the banks felt that during the war period a great deal of the business that would be done in the country would be done by contractors with the government and the banks simply had to find out some way of financing all of that government work if the banks were to finance most of the business being done in the country.

In order for the banks to get that business, they were confronted very shortly with the proposition that, unlike the usual commercial situation, they were in no position to get an effective assignment, and hence the banks at the committee hearings in Washington were very eager to cooperate and to work out a basic plan whereby the banks could make those loans and get effective assignments, and the Assignment of Claims Act of 1940 resulted.

He then went on and referred to the basic difficulty between the bank on the one hand, which made the loan, and the surety company on the other, which guaranteed the loan, and he made a remark which interested me very greatly, in view of Mr. Weichelt's remarks. He said that the banks always regarded the surety bond as something that was non-cancellable, which, of course, is the law, and it seemed to me that when I talked with others afterwards, that everybody regarded it that that not only was the law but should be the law. After all, if a surety company can sign a bond on a contract and can then walk out of that bond when the contractor becomes improvident or extends his business activities too far, then nothing comes at all of the bond, and I think that that situation of a contractor extending himself is to be sharply distinguished from the case where a surety company signs a bond for a guardian who is going to be in there maybe for 20 years and the surety can go in, under the statute, and pay up his liability to a certain point, get a settlement of accounts and then have somebody else take the risk from there on in.

So this attorney for the bank said that they regarded a bond as being absolutely not cancellable and would insure the completion of the contract.

Then he came finally to the subject that we are all so much interested in, as to who gets the money in the event of a default, whether the money that is there stands between the surety and its ultimate liability or whether the bank gets it back, and he said frankly that he didn't know. He said that from their viewpoint, the bank made a loan of so many dollars, on which it would get a rate of interest, and that, traditionally, they expected to get that back. The surety company advances nothing but its credit, for which it receives the premium. He summed up his view on it by saying that he thought that the banks would have to be content with taking back on their loan under their assignment what was left after the government had reimbursed itself and after the surety had grabbed what was there to exonerate the surety before it was compelled to pay anything. That was their viewpoint and I can only report it to you as I got it on that occasion.

MR. WEICHELT: Mr. Cathcart, I believe I may have given the wrong impression. I never intended to imply that a surety company relieve itself of a contract having been signed.

MR. CATHCART: I didn't understand you did.

MR. WEICHELT: But I do say that if the surety companies can do so, they should insist that an amendment be given for notice, and also that that assignment, that the surety does have a right to take the contracts over from that point. They may discover that the contractor has spread out so far or circumstances have arisen that they would much prefer carrying the contract on from that point. In other words, if the contractor can't finance himself, I think the surety should have something to say as to what should be done with the contract. I didn't mean to infer that the law gave them that right or anything of that kind. I just had in mind that the surety should be notified and be given some rights on the completon of the particular obligation if assignment is allowed.

QUESTION: Couldn't that be handled by agreement between the contractor and the surety at the time?

MR. CATHCART: Here is the practical approach to that as I look at it; at least, this is the approach that we take. If we sign a bond and the contractor starts working and he is becoming involved by the non-payment of bills and the contract provides for the payment of bills, so the non-payment would constitute a default, we can urge the declaration of the default by the obligee. Now, when we have urged the obligee to declare the default, they have followed our request.

What would be the position of the surety, for instance, if a contractor became obligated for the payment of bills and the surety felt that he should be declared in default because of the non-payment of the bills and the obligee refused to declare him in default and, as a result, a loss occurred under it to the obligee? I was going to say under the bond, but to the obligee. What would be the

surety's position with respect to that liability? That question has not been decided, as far as I know, because the obligees have followed our request. Have you a thought on that?

MR. KELLEY: Have you had any experience with allocation agreements between sureties and banks?

MR. CATHCART: I would rather not touch on that at this meeting.

MR. KELLEY: You regard that as a separate item? The discussion up to this time refers only to cases where there has been no such agreement.

MR. CATHCART: I am not in favor of the agreements and I don't want to talk about them if I can avoid it.

MR. KELLEY: Well, doesn't the form of agreement they have used, though, say that failure to pay labor and material bills constitutes a default? I have seen such agreements.

MR. CATHCART: That is correct, and the agreements say a lot of other things. We could continue this for quite a long while if we started going into those allocation agreements. There are some companies that have signed them. Others have not. Some have refused. I don't think they are being used generally and I don't know that they are being used at all at this time. They have been used in exceptional cases.

MR. CROSBY: On the question you raised on these government contracts, there is no provision in there that default in paying the bills shall constitute a default on the contract, but in the Martin case the Supreme Court held that a default under the bond is a default under the contract. The problem would be to get the government to declare a default because of non-payment of bills.

MR. CATHCART: Yes. Well, you have to make your demand upon the contracting officer, which we have done in some cases.

MR. CROSBY: Whether you should be able to sustain a claim against the government by reason of its failure to declare a default is a very questionable thing.

MR. CATHCART: That is what I think, too, but that is an open question.

Well, gentlemen, I think I have covered the points that I wanted to raise and unless you have some further points you want to have us discuss at this forum, I will call it to a close. Is there anyone who has a point in mind or would they like us to attempt to elaborate on what has been said heretofore?

MR. NICHOLS: There is just one additional point, Mr. Cathcart, for the purpose of the record. The two or three cases that have been decided in the comptroller general's office have been decided purely on administrative procedures, haven't they?

MR. CATHCART: That is correct.

MR. NICHOLS: I mean, the comptroller general has ignored what may be the legal position of the sureties with respect to any assignments, indemnity agreements or otherwise, and I take it has not paid too much attention to the sureties' well understood rights of subrogation. In other words, they look at this Assignment of Claims Act of 1940 and merely administrate under that as they understand it. Is that right?

MR. CATHCART: As I understand it, they have accepted the legal position of the bank and ignored the equitable position of the surety. I think that has been their attitude and their reason for holding in favor of the bank. They feel that it is not within the province of that office to consider equitable matters and that should therefore be a subject to be decided by the Court of Claims, and, of course, it is just the passing of the buck right along. But remember that the Court of Claims has just passed on this in this Modern Industrial Bank case and they have followed. the reasoning that we have advanced here today all the way through, and certainly that case holds out hope that the other cases that we have will be followed the same way.

MR. CATHCART: Well, gentlemen, I certainly appreciate your help and your attention and cooperation.

MR. NICHOLS: I would like to say before we leave that we have here about 25 copies of reprints of Mr. Cathcart's paper in the Insurance Law Journal. If anybody hasn't seen that or has seen it in the Journal and would like reprints of it, they can have them here.

I think as a practical solution to this problem, we haven't decided here today who gets the moneys in the hands of the government in the event of default; whether it is the sureties or the banks, and it may be some time before the courts decide that question, at least to our satisfaction. I do think that the banks have a lot to talk about if they are going to continue to help to finance contractors, and certainly surety underwriters have a lot to take into consideration and to talk about. A bank that lends its money, that

helps to keep the contractor a going concern, particularly on a certain job that might otherwise fail, I think is entitled to be considered in the distribution of the moneys that otherwise would have been payable to the contractor. Of course, if a bank merely chucks in money and the contractor who is about ready to fold up takes that money and squanders it on other ventures, as we have known to be the case, then there are other considerations including whose duty it should be to watch that money. But where a bank has put money at the disposal of a contractor, and it has gone into the job, and has brought the construction to completion, or substantially to completion, and that money has been used to satisfy labor and material and perhaps sub-contractors' bills would have otherwise been chargeable to the surety, then certainly I think that the bank must be given consideration, whether this Assignment of Claims Act of 1940 is sufficient in law to give it or not. As time goes on I think the surety companies and the banks must sit down and make some sensible agreement among themselves, whether you call it an allocation agreement or what not. I think there should be a meeting ground where such reasonable business men can agree. Whether this can be done in a general way covering all future jobs and loans or purely on a facultative basis is something that will have to be given further consideration.

I thank you all for coming and for your participation. I have enjoyed it and I hope that you have. (Adjourned at 4:10 p.m.)

War-Made Duties and Responsibilities of the Bar

By Floyd E. Thompson
Chicago, Illinois

WE meet to confer in solemn times. Millions of the flower of our manhood are under arms and fighting on far-flung battle fronts. The blood of Americans is being mingled with the soil of every continent and thousands are dying to preserve our great inheritance. Our present duty is clear. Every other activity must be subordinated to support these men facing the enemy in combat. The organized bar has rendered distinguished service in furnishing legal aid to men in the armed forces and their dependents and in other war activities. Lawyers in civil life have proven that there is a place for them in the prosecution of a war and have won the commendation of representatives of all branches of the service. Our hearts, our minds and our energies will be centered upon the speedy and successful termination of this terrible war until the fangs of the war dogs are pulled and the job of crushing their whelps is done.

When that happy day arrives, the brave men who have borne the brunt of battle will have completed the task assigned to them. The dead will be mourned, the invalided will receive the tender care of a grateful people and the able-bodied will be welcomed home as conquering heroes. Then what! Will this terrible expenditure of blood and treasure be wasted in a temporary victory over military aggressors and will they be permitted to grow strong again and left free to start another war? Civilization may not survive another such victory. Tremendous as has been the task of organizing this Nation for war, it is not greater than the task that lies ahead to find the method and the means of preventing a third World War. War can never be eliminated but it can be isolated. Society has developed the methods and means of compelling individuals and small groups to keep the peace to a degree that community life is reasonably safe and agreeable. The tragedy is that it has failed to devise the method and means by which to restrain larger groups, called nations, from loosing the war dogs at their pleasure and creating situations which draw all nations into the conflict. Among themselves the people of a nation generally maintain order under domestic laws, but in their international relations they live by the law of the jungle. To preserve the peace we must have war, but the family of nations can localize the war to the aggressor who disturbs the peace, if civilized nations want peace.

There is general agreement that something must be done to assure the maintenance of order among nations and that this object cannot be attained unless this Nation does her part in devising the method and contributing to the means, but there is wide divergence of opinion as to what our Nation can and should

do as a member of the family of nations to accomplish this noble purpose. We are the most powerful nation on earth and we cannot escape the consequences of our position if we had any desire to do so. We are no longer insulated from the disturbances of other sections of the globe. Distances have been eliminated and barriers have been removed. We shall be drawn into every global conflict, whether we want war or not. Neither our geographical position nor our independence nor our strength can prevent it. If we want peace we must see to it that peace is maintained in the world by isolating war before it becomes global in character.

The only alternatives to order under law are tyranny or anarchy. This is readily accepted as to domestic affairs. We have secured personal liberty by establishing and maintaining a government of law. If we accept recorded history as our guide, we know that liberty cannot exist without order and that order exists only where there are laws governing human conduct. If our experience has shown the necessity of law to maintain peace and security among individuals, then it must follow that law is equally essential to peace and security among nations. The fact that the people of most of the nations of the world are now engaged in a global war for the second time in a generation is a serious indictment of the intelligence of mankind. There has been great progress in the last hundred years in the development of the law governing the relations of nations, but what is to be the international law of the future is a challenge which must be met with determination and intelligence. Of necessity and of right, the people of this Nation look to their lawyers for leadership and by no form of special pleading or specious argument can the lawyers evade their responsibility.

Recently the American Bar Association, through its Journal, sent to its members a treatise of the "International Law of the Future", which stated certain postulates, principles and proposals representing a community of views of a group of lawyers who had held a series of discussions over a two-year period. It is not presented as a set of specifications but as a mere outline offered for study and criticism. Any lawyer who does not study this treatise and other available material and prepare himself to furnish intelligent guidance to his neighbors in the course our Nation should take as a member of the Community of Nations is missing as great an opportunity for patriotic service as was presented to the founders of this Nation and is false to his trust as a guardian of the people's freedom and security. We can no longer be indifferent to international anarchy.

I say to you without apology that I have not yet determined in my own mind what should be done. He is indeed a bold and confident man who states with finality that this Nation should become a member of an international organization with legislative, judicial and executive powers which may be exercised for or against this country or which this country would be committed to have a part in exercising for or against others. There are those among us who dogmatically oppose any collaboration with other powers which would involve commitments to yield any of our freedom of action and there are those who are ready to jump off the deep end and have us become a mere unit of a confederation of nations subject to the control of an international assembly and council. That both of these groups are wrong I am certain. Neither group is giving any heed to the lessons of history. But surely somewhere between these extremes is a course which our country can take which is consistent with our traditions and our security and which will advance and protect the interests of the peoples of all nations of the community. The fact that devising a method and providing the means of maintaining order among nations is difficult of solution and is attended with risk cannot justify an attitude of surrender to the seeming inevitable, but it does warrant caution and demands watchfulness.

The avowed purpose of the statement of postulates, principles and proposals for the international law of the future is to aid in revitalizing and strengthening international law and laying the bases of a just and enduring world peace securing order under law to all nations. Surely, no one can quarrel with this noble object. All are indebted to this group of learned and earnest men for their labors and for the stimulus they have given to thinking on this vital subject. The fact that one may not agree with some of the proposals is relatively unimportant. What is important is that any criticism be constructive and considered. In my criticism I do not ascribe to the members of the study group an intention to propose any participation by this Nation in any scheme which would impair its sovereignty or commit it to intermeddle in the internal

affairs of any other nation. Because I believe this study to be the most authoritative and impartial available, I consider it entitled to respectful attention.

The six postulates of the statement indicate the premises for a system of law governing the relations among nations. They start out with the premise that "The States of the world form a community and the protection and advancement of the common interests of their peoples require effective organization of the Community of States", and proceed with the truism that "The development of an adequate system of international law depends upon continuous collaboration by States to promote the common welfare of all peoples and to maintain just and peaceful relations between all States." Thus far few could find any objection. But what of the statement that "The sovereignty of a State is subject to the limitations of international law." Before our country can safely subscribe to this, we must know who is to make and interpret the law. If the law is to be made by an international assembly representing the existing seventy-odd nations in which we shall have only one vote and if it is to be interpreted by an international court and executed by an international council, on one or both of which we may not be represented, it should not be difficult to decide that we want no part of such a set-up. However, that need not be the set-up and it is possible to form an organization to which our country may safely belong. A nation does not surrender its sovereignty by agreeing to abide by international law which it has had a part in making and voluntarily accepts, any more than a citizen loses his liberty by yielding some of his freedom under domestic laws which are made by democratic processes under proper safeguards.

When we come to consider the ten principles for the international law of the future, we get on controversial ground. We can readily agree that each nation should refrain from intermeddling in the internal affairs of any other nation and we can recommend that some of the busy-bodies in Washington take heed of this principle. We can also commend with enthusiasm to our Russian brethren the principle that every nation has a legal duty to prevent the organization within their country of activities calculated to foment civil strife in our country. But we pause for serious reflection when we are told that it is a principle of international law that our country "may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform" its duty to carry out in full good faith its obligations under international law. Here again we want to know who fixes the obligations. It is an act of sovereignty to accept voluntarily an obligation but it is a surrender of sovereignty to permit others to impose it. Just how we can subscribe to the principles which declare it to be the legal duty of a nation to refrain from any use of force in its relations with another nation, except as authorized by the competent agency of the proposed Community of States, and to take such measures as may be prescribed by such agency for preventing a use of force by any nation against another, without taking from our Congress the control of when we shall declare or refrain from declaring war, is too deep for me. This problem of providing an international police force and naming the chief of police is one of the most difficult of solution and yet I have not been able to determine how war dogs are to be chained and local wars isolated and stopped before they spread over the globe without some such agency. The lessons of history teach us that it is now only a theory that our Congress decides when we shall go to war. We have been drawn into two global wars in the last generation which we had no part in starting, and we have now nothing to assure us that we shall not be drawn into a third if the unlimited right of nations to wage war upon one another remains. When total war is the price of total sovereignty, the price is high. International anarchy will continue unless international law establishes order and this country must do its part to devise some method of protecting the peaceful nations from the outlaw nations and helping to provide the means to make it effective. To accomplish this within the limits of our constitution is a challenge to the best brains of the bar.

The real danger signals appear crystal clear when we consider the concrete proposals for this new order in the world. In skeleton form these proposals were incorporated in resolutions of the Section on International Law submitted for adoption in the House of Delegates of the American Bar Association at the mid-year meeting in Chicago in March. On my motion the whole subject of post-war international organization and of participation of our country therein was referred to a special committee for study and report. My principal object was to give the lawyers of the United

States full opportunity to study the subject and to express their views through their local organizations. If you do not accept this opportunity and challenge promptly and affirmatively, you may find yourselves committed by your representatives in the House of Delegates to proposals with which you do not agree. The course our country takes is vital to its security and to the happiness and welfare of ourselves and our posterity. Let us do our full duty as lawyers in guiding her to a safe course.

There are twenty-three proposals set forth in the treatise on the "International Law of the Future". We cannot consider all of them. If they were merely the proposals of the group of jurists, professors, lawyers and officials who make them, distinguished as they are, it might be said that the bar generally need not concern itself with them because they would not be seriously considered by the representatives of the nations of the world in conferences during and following the war. But they are more than the proposals of this distinguished group of private citizens; they follow the pattern of pronouncements already made by top-flight officials of the United Nations. Certainly, there are strong advocates of these proposals in our own State Department. As we have seen, some of these proposals were incorporated in resolutions presented to the House of Delegates of the American Bar Association at its last session, and I warn you they will be presented again and again and again. We have engaged in the dangerous pastime of watchful waiting too long. The time for decision and action by the lawyers of this country is at hand. When the decision is made I hope the lawyers will be prepared to act intelligently.

It is proposed that all nations should be organized into a Community of States and that there should be a General Assembly in which every nation should be represented. An appendix lists seventy-three existing national states with populations ranging from 1,000 for Vatican City to 450,000,000 for China. If the representation were proportional to population and the smallest were given one representative, the largest would have 450,000. An additional problem of representation is presented by the fact that many of these nations have more population in their dependencies than they have at home. For instance, Great Britain, with a population of 48,000,000, has more than 80,000,000 in her dependencies, exclusive of the 400,000,000 in India and other semi-independent parts of the Empire. The Netherlands, with its 9,000,000 people, has 70,000,000 in its dependent colonies. Are these subject peoples to have a voice in this world assembly?

It is proposed that this assembly shall have power to deal with any matter of concern to the Community of States, including the power to modify existing international law and to enact new general rules. Certainly the United States of America cannot become a member of any such Community of States unless it has a voting power consistent with its position among the nations and the responsibilities it will be expected to assume. If there is to be proportional representation on any sound basis, it is obvious that the smaller units must be grouped for voting and that the group must vote as a unit. The principle of State equality does not stand in the way of a recognition of actual differences in fact, but it presents a formidable problem which will be difficult of solution. It will be relatively simple to set up an international organization which can deal with problems of international trade, international finance, international transport, international communications, public health, and cultural and scientific interchange, but when it comes to limitations of armament and suppression of aggression and other joint action to outlaw war and preserve peace it will be difficult to make participation of our country square with its sovereign rights as an independent nation and its traditional policy of not intermeddling in the affairs of other nations.

We have had long experience with a Court of International Justice, and the proposals with respect to the judicial tribunal of the new international organization presents few new problems. But let us look at the proposed executive department. This is to be an Executive Council on which only a few nations can have a member. This body will meet frequently and its powers will be great. It is suggested that it be composed of representatives from States having important roles in international affairs which, we must assume, means the great powers. Certainly this country cannot become a part of any organization in which it is not guaranteed a permanent place on the Executive Council. With this assurance and the further assurance that the action of the Executive Council shall be by unanimous vote, most of the objections to our participation in an international organization

to secure order under law would be removed.

One proposal to which we can readily subscribe is that all treaties or international agreements shall be registered and published. The noble purposes of the revered Woodrow Wilson were wrecked by the secret understandings by which Great Britain and France divided the spoils of the first World War and we are paying an awful price to regain the islands Japan got by her secret treaty with Great Britain. We made the mistake twenty-five years ago of not compelling our Allies to lay their cards on the table face up and we had better profit by that mistake this time or this war will have been fought in vain.

Enough for the proposals for the international law of the future. Now to the question of how we can enter into whatever engagements it is finally concluded the interests of our country require us to make. Must these engagements be concluded by treaty in which the Senate, by a two-thirds vote, must concur, or can they be made by agreements which a majority of Congress approves? It seems to be settled by many precedents that treaties are only one method of participating in international affairs. Throughout our national existence, international agreements have been made by the President, acting alone, and by the President, acting with the approval of a majority of both Houses of Congress. There have been more than a thousand such agreements in our national history. Through agreements approved by Congress, we have already become a member of various international organizations, such as the Pan-American Union, the International Labor Organization, the Universal Postal Union, and the Inter-Allied Rhineland Commission. Still fresh in our minds is the agreement under which we exchanged with Great Britain fifty destroyers for air and naval base leaseholds. The distinction between treaties and agreements is peculiar to our constitutional law. International law pays the same respect to both. International agreements have been recognized as valid in every case in which they have been considered by our courts.

Time will not permit a full discussion of this interesting subject. It seems appropriate, however, to point out the difficulty of incorporating in one treaty all agreements respecting settlement of the numerous and complicated problems caused or aggravated by this global war. It does not appear wise, even if it were possible, to settle in one treaty the infinite number of boundary, economic, political and other questions around the peace conference table in an atmosphere of war-engendered passions. If order in the world is to be restored and a lasting peace established, it would appear that the wise course would be to reach separate agreements at a series of conferences extending over several years. In this way it may be possible to establish a sound basis for the erection of a general international organization which will advance and protect the interests of all peoples of all nations and maintain just and peaceful relations among the nations of the world. I certainly do not advocate evasion of the constitution or further usurpation of power by any agency of government, but it is a little difficult to defend the wisdom or the justice of a constitutional provision which commits to one-third of the Senators plus one the power to determine what international agreements may be made, when they might come from States representing one-thirteenth of our population and be elected by barely five per cent of our voters. Fortunately, there is no such constitutional impediment to action by this sovereign nation, which, more than any other, stands in a position to make the greatest contribution to an arrangement looking toward order and security under international law.

Need I say more to indicate the new duties and responsibilities which this war has placed on the lawyers of our beloved country? Our first duty is to keep ourselves free so that our thinking and acting will be impersonal and non-partisan. The lawyer, above all other men, should have a quick perception of what is feasible among the many schemes proposed for establishing order under law, international as well as domestic, and of the part our country can take in any international organization, consistent with our traditions and our security. It is he who knows the limits of our constitution and who can measure with intelligence the effect upon our way of life of the participation of our country in any organization of nations. Lawyers know that it is not safe to live in a dream world. They are practical men who know human traits. More than any other group of our citizens, they contributed to gaining liberty for our citizens and establishing a form of government under which free men are privileged to enjoy liberty under law. The lawyer can play his part in the unending struggle of lifting society from one stage to the next of its development of

better living conditions only if he has the right insight and sympathy. If he will not assume the role of patriot and statesman, if he will not lend his learning to the service of the community, less expert hands than his must attempt the difficult and perilous business of government.

You have noticed that I am able to raise objections to proposals of others for the establishment of an international organization to which all nations shall belong which will have the duty and the power to strengthen international law and administer it for the general good of all peoples. Any lawyer can do this without much thinking. I am not satisfied to be a mere obstructionist. I want to contribute something constructive in this effort to save us from being drawn into another war growing out of Old World quarrels in which we have no direct concern. There are problems to be solved which are vital to our national existence, and whether we are blessed or cursed by posterity depends upon our solution of them. The time is at hand for every lawyer to stand up and be counted. I conclude with a prayer that a Divine Providence will give us light to see the right and the wisdom and courage to do it.

Some Consequences of the Southeastern Underwriters Decision

By John H. Hughes
Syracuse, New York

I was a little optimistic when I selected my topic. At that time I had not explored the subject matter in any detail. However, the more I studied its various aspects, the more I became satisfied that all I could hope to do at a meeting such as this, was to very sketchily point out some of the real problems. After spending considerable time in preparation of this paper, I feel qualified to say that I can make no predictions.

Before discussing the possible effects of the decision, it is necessary first to examine the facts and the holding. In 1942, 198 companies and 27 individuals were indicted by a Federal Grand Jury in the Northern District of Georgia for certain violations of the Sherman Anti-Trust Laws. The Sherman, and Acts amendatory thereof, prohibit, among other things, price fixing, creation of monopolies, discrimination in price, rebates between different purchasers of same commodities, sales conditioned on purchaser not using commodities of competitors, boycotts, acquiring stock of competitors and interlocking directorates. The indictment in this case alleges two conspiracies —first, violation of Section 1 of the Act, in that the participants did restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified allied lines in certain States; and second, in violation of Section 2 in that they did monopolize trade and commerce in the same lines of insurance in and among the same States.

As you know, the District Court sustained the demurrer to the indictment on the ground that insurance was not commerce within the meaning of the Commerce Clause of the Constitution, and that, therefore, the Sherman Act had no application. The District Court relied on a series of Supreme Court decisions starting with the holding in Paul vs. Virginia, some 75 years ago, that insurance was not commerce. The Supreme Court rendered its judgment, reversing the lower Court, and sustained the indictment. The case holds that insurance is commerce and so far as it is interstate commerce is subject to provisions of the Sherman Act. Another precedent was created when four members of the Court, for the first time in its history, reversed a previous holding of the Supreme Court on a Constitutional question. A majority of the Judges agreed that insurance is commerce. Two Judges took no part in the decision. Justices Stone, Frankfurter and Jackson wrote dissenting opinions.

The immediate result of the decision is to afford a weapon for bringing to an end any discrimination against foreign insurance companies by the States under their police and taxing powers, so far as the business conducted is interstate.

Some writers contend that no detrimental effects on the companies or the business should follow since no Federal regulating body is prepared to act, and the Sherman Act is not a regulatory law and can only prevent certain

practices. Such thinking loses sight of the great changes which may be necessary and costly to both State and companies, and, therefore, the policyholder, as I shall attempt to hereinafter point out. But the decision has been made—insurance is commerce subject to the interstate Commerce Clause of the Constitution, and whatever Federal regulation thereof may properly be held to follow.

In order to grasp the magnitude of the subject matter, please have in mind that the system of State regulation of the companies has been built up over a period of 100 years, during which time there has been no interference by the Federal Government; that, in fact, in the earlier decisions of the Supeme Court, as well as declarations of Congress, there has been an established attitude that insurance was a matter for State regulation only. With this "fiction", as it is called by Justice Jackson, firmly established, the companies as well as the States have spent vast sums of money and time constructing methods of operation mutually beneficial to the citizens and the companies. While it cannot now be said that all this has been for naught, the companies are in a new era and their future actions must be govened in light of this decision. Yet, though State and company may be willing to cooperate to the end that the transition will come as simply as possible, both are in a dilemma since there are no well defined avenues which they may follow with the knowledge that the course has been correctly charted and will not later be challenged by the Department of Justice as being in violation of one of the Federal laws.

Insurance companies are financial institutions. They have grown and prospered under self and State regulation. They have rendered a public service by affording the citizens of the several States protection against many forms of loss. The benefits to State, policyholder and investor are a matter of history. At the end of 1943, the total assets of all companies aggregated nearly 45 billion dollars and the annual premium income reached 8 billion, the latter figure being more than the annual expenditures of the Federal Government between 1920 and 1936. So to think of changing from the well-developed and thought-out systems to some new and untried methods, raises a multitude of practical problems and a flood of legal questions, many of which cannot be satisfactorily answered.

At this point, may I remind you of what Justice Stone said, in part, "The immediate and only practical effect of the decision now rendered is to withdraw from the States in a large measure the regulation of insurance and to confer it on the national government—which has adopted no legislative policy and evolved no scheme of regulation * * *."

Justice Jackson pointed out that the State regulation has been a successful and going concern; that through trial and error great experience and good administration developed; and the decision will require an overhauling of State legislation as to tax and supervision, and that the States will lose important control and revenue.

In New York, as well as many other jurisdictions, the State law requires a standard form for certain policies. New York State has a policy bureau, one of the objectives of which is to encourage uniform forms of policy. Most every one agrees that this is the thing to do and many States require uniformity for some forms of workman's compensation, automobile, fire and casualty insurance policies. The uniformity has been arrived at over the past years by cooperation among the companies voluntarily and at the instance of State regulating bodies. The same is true as to rates. Where practically possible, the companies, under the supervision of the Commissioners of Insurance, have, by agreement, arrived at rates which are uniform in a given area for the purchase of specified coverage. In New York State, the Superintendent has authority to determine that the rate is inadequate, excessive, unjustly discriminatory or otherwise unreasonable. The obvious purpose of this procedure was to establish a form of policy and a rate therefor which would enable the purchaser of insurance to know that in buying a certain policy he was getting the same type coverage as his neighbor and at the same relative cost. Some hold that this procedure is illegal under the decision, arguing that companies cannot combine to agree on either forms or rates and all are subject to the penalties of the Sherman Act despite the fact that they are following the requirements of the New York State law.

As an example of the obstacles to be encountered, let us consider a practical New York problem which might be that of any State. A little over a year ago, boiler and machinery insurance was being written by four groups of companies. Each of the four groups had different manuals, rating methods and

rates. Bear in mind that one object of regulation is to make the sale of insurance as simple as possible for both parties to the contract. A controversy arose, since it was almost impossible to compare what each of the four groups was selling, that is, the agent of one company could not explain the difference in coverage and rates of the other three groups. Out of this manner of doing business arose a competition among the groups which convinced the Department of Insurance that the policies were being sold at a figure which was economically unsound. The Superintendent called the groups together, and under his statutory power hereinbefore mentioned, having concluded that it was unreasonable to operate as just described, insisted that all four groups agree upon a uniform rating method. The Department did not require uniform manuals or policies but returned the rate to a level that was deemed to be sound. Under the Sherman Act, the practice used in this instance might be illegal even though such methods of regulation have been exercised by the States under their police power. The practice of encouraging uniformity has been for and inured to the benefit of the public. What the substitute for such procedure will be, and whether it will be better than the present method, only time will tell.

Let us examine another phase of regulation which now seems objectionable. In fire, casualty and surety, as well as some workman's compensation, the rates are based upon a prospective estimate of what the loses will be and that, in turn, is based upon what happened before, on the average. It has been the practice for many years, for the companies to pool their information. Under the New York law, they are required to furnish it to the Insurance Department. It is clear that the average of one company is not nearly as valuable as the average of all companies writing a certain type of business in a given area. If the rate is based upon the average, the greater the experience, the more accurate it will be. If, on the other hand, the companies in these fields cannot pool their information for rate making, the soundness of the average on which the rate is based is immediately jeopardized. If the competition is to be free and information is not to be pooled, it is most unlikely that the respective companies would make their statistical information available for the others. If all of the averages are not considered in rate making, the rank and file purchaser may pay more for his insurance.

Rate making is a scientific business. A great number of technically trained persons are presently engaged in establishing the cost of the policy you and I buy. If combining to establish these rates is illegal, another means must be found, the alternative being, rates fixed by the State or by the individual companies. In either event, the cost may be increased. The change in practice fosters the very thing the Sherman Act is meant to guard against — discrimination — for without uniformity there is bound to be discrimination.

An illustration of the impracticability of restraining companies from combining for rate and policy-making matters is the Inland Marine business. This business encompasses many and varied risks which could not otherwise be insured. In 1931, an association was formed to stabilize rates throughout the United States so that a buyer could be sure he obtained adequate coverage at reasonable rates; so that the coverage at reduced cost could be broadened when justified, and to supervise acquisition costs to afford fair compensation to producers without allowing unfair competition at the expense of the buyer. This insurance covers a wide assortment of risks, including bridges, tunnels, bailee's customers policies, art collections, etc., its characteristic being its extreme flexibility, allowing it to cover new situations adequately and promptly. This business could only be written by large combination of companies already agreed as to coverage, rates and conditions. But no matter how fairly the companies conducted their business, they are in danger of indictment if they join with each other to fix rates, forms and conditions. The Inland Marine risks frequently involve such large amounts as to require the combined underwriting capacity of many companies willing to engage in it, but they are then subject to the charge of restraint of trade and monoply.

The Supreme Court says that price fixing agreements are illegal and although the Court has held, in interpreting the Sherman Act, that certain reasonable restraints were not forbidden, it has also held that such rule does not apply to agreements fixing prices, which are criminal per se. *United States vs. Socony-Vacuum,* 310 U.S. 150; *United States vs. Bausch & Lomb,* 321 U.S. 707. In the latter case, the Court recently said, "Price fixing reasonable or unreasonable is unlawful per se". So here certain companies, having joined together to meet an urgent public need, are liable to criminal prosecution and neither good

intentions nor public benefit are of any consequence or weight to relieve them from the force of the statutes.

What are the respective powers of the State and Federal Government? Now, assume the Superintendent of Insurance is about to make an order against a company under the law of any State. Must he first ask the Federal Government whether the transaction is inter or intrastate? If the transaction is intrastate and a valid exercise of the police power, there is no difficulty. If the transaction is interstate, there are cases holding that where Congress has not acted, the State may legislate within reasonable limits in the field of interstate commerce, but the question arises as to whether or not the particular legislation goes so far as to constitute an undue burden on interstate commerce and, therefore, becomes invalid. (Minn. Rate Cases Parker vs. Brown.)

Thus, since Congress has not acted, the State must proceed with the knowledge that it may later be over-ruled and each transaction, as Justice Jackson said, must be decided on a case to case basis. This is a most unfortunate situation from a public viewpoint. Over the years, the companies, in cooperation with the States, have developed organizations which are a credit to the country. They are financial institutions in which the public has confidence. Nearly every household is affected by some form of insurance today. In order to maintain the confidence of the public, the companies must be stable and stabilization cannot follow if litigation is necessary to determine the power of the State in each instance, for it creates an atmosphere of uncertainty, dissatisfaction and suspicion.

So far we have been speaking of the application of the Sherman Act and amendments thereto. There is, however, another statute seemingly of equal force and application, and one which might prove to be even a greater burden on the industry if exercised—that is the Federal Trade Commission Act. This law, found in Title 15 U.S.C.A., Chapter 2, Sections 41-47, was passed in 1914 as a further regulation of interstate commerce. Its objectives are substantially as follows: To prevent unfair competiton and/or deceptive practices; to give the Commission complete power to investigate corporations engaged in interstate commerce; to require the filing of annual specific reports and to afford the machinery for investigating violations of the anti-trust statutes and compliance with decrees. Banks and common carriers are exempted from the requirements of the Act. While it has always been thought that insurance companies did not come within the Federal Trade Act, so it was thought of the Sherman Act. Now that assumption can no longer be relied upon. Had an equity suit been started in the Southeastern Underwriters case, under Section 47 of the Federal Trade Act, the District Court could have referred the suit to the Federal Trade Commission to determine an appropriate form of decree therein. Section 46 provides that where a decree has been entered, the Commission may make investigations upon its own initiative as to the manner in which the decree has been carried out or the Attorney General may make such investigation. The Commission is required to report its findings to the Attorney General. This statute applied to the insurance business would give to the Attorney General and the Trade Commission the power to regulate the management of the insurance business and more power than is now possessed by the State Departments, for theirs is to see that the companies comply with the law rather than to interfere with the operation of the business. The chief weapon of the Federal Trade Commission is the cease and desist order, with attendant publicity. Banks are exempt, probably for two reasons, first, they are subject to either State or Federal control, and second, they are financial institutions and bad publicity would impair the confidence of the public. If there is any merit to the reasoning just used, it applies with equal force to the insurance business. The fact is that the States are equipped to regulate practices and obtain all necessary information as to the financial condition of the companies operating within their respective jurisdictions. Although each can prevent unfair practices, so long as the Commission has authority, it is not beyond the realm of reasonable thinking to suppose that a substantial number of real or imaginary complaints will be made, calling for an investigation. What action will the Federal Trade Commission take and what interpretation of the statute will be given by the Attorney General? It is hard to believe that any opinion will be forthcoming denying authority to the Commission to exercise its customary powers.

On the other hand, there seems to be support for the claim being made in some quarters that the existing state regulations, which

do not discriminate against interstate commerce in favor of intrastate, are valid even though they impose a burden on interstate commerce—but State regulatory legislation would be invalid to the extent that it is inconsistent with or contrary to Federal legislation. So far as State laws regulate matters of local concern, they would be sustained. In the so-called *Minnesota Rate Cases,* 230 U.S. 352, the Court sustained the rates as to the one railroad and held them to be confiscatory in the case of another railroad in view of the particular facts shown with respect to the latter. The Court said, in part, "Thus there are certain subjects having the most obvious and direct relation to interstate commerce which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government, because of the necessity that they should not remain unregulated and that their regulation should be adopted to varying local exigencies."

Again in *Parker vs. Brown,* 317 U.S 337, the Court said, in part. "The governments of the States are sovereign within their territory save only as they are subject to the prohibitions of the Constitution, or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the States the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

However, it should be borne in mind that the result in each case will depend upon the facts and circumstances surrounding each regulation and, therefore, the above contention, although supported by these and other cases, may be something of a guide but nothing more, and that the litigation of which I spoke earlier is still the only real way of knowing where the boundaries lie between State and Federal regulation in the insurance business. Possible solution of some of the intricate problems presented in as follows: (1) Enactment of more State regulating laws; (2) passage of the Bailey-Van Nuys Bill, or similar legislation; (3) Constitutional amendment to exclude the insurance business from the realm of interstate commerce. Some steps have already been taken toward fortifying the State laws for the regulation of insurance. In North Carolina, Governor Broughton has appointed a 15-man commission to study the subject and propose legislation for submission to the next meeting of the General Assembly.

While the indictment in the present case was pending, and before the Supreme Court decision, New Jersey enacted a rating law.

Other States are now studying the situation with reference to passage of proposed legislation to regulate, which will continue their control of insurance companies and keep the revenue which in some States has become an important part of their income. In New York State last year, for example, the companies paid over 17 million dollars in taxes. The States naturally are reluctant to lose any substantial part of such tax income though it is not known what taxes the Federal Government will impose, or what part of the present State tax may be found to be an undue burden on interstate commerce and thus invalid.

The so-called Bailey-Van Nuys Bill has passed the House and is at present pending in the Senate. This bill reads, in part, as follows: "* * * That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business, or in any wise to impair the regulation of that business by the several States."

It will be seen that this proposed legislation applies to the Sherman and Clayton Acts and excludes the insurance companies as it does the banks from their provisions. It does not, however, mention the Federal Trade Commission Act, which, as we have already pointed out, is a powerful weapon in the hands of the Federal Government, and which if used, could prove to be a costly and powerful influence affecting the destiny of the insurance business.

The last suggestion, that of an amendment of the Constitution, is a remote possibility because of the difficulties and time involved in accomplishing such an end. In the meantime, some action must be taken. How far those in the Federal Government intend to go cannot now be determined. Attorney General Biddle appeared before the Sub-Committee on the Bailey Bill and vigorously opposed its enactment. His suggestion that the States actually fix rates cannot solve the present crisis. It would take years, if the States were willing, to conform their laws, and further, certain

phases of the business are incapable of being brought within any tariff, but must be rated on individual merit. The Insurance Departments can supervise them, but they would not attempt the rating of such risks in the first instance.

It will be of interest to you to know that as Mr. Fraizer told you yesterday, the Executive Committee of the National Association of Insurance Commissioners met in St. Louis on August 30th, last, and has recommended a course of action, part of which is that the Sherman and Clayton Acts be amended so as to permit reasonable cooperative action among the companies when necessary and incidental to the collection of statistics, rate making, coverage, etc. The latter proposed amendment does not go as far as the Bailey Bill but reserves to the Federal Government under the Sherman and Clayton Acts, the power to prevent boycotts, monopolies and restraints in trade.

The association adopted a resolution to implement this program by the appointment of a joint committee of commissioners and industry to take up the foregoing with Congress.

In the light of our experience in recent years, can we safely conclude that the Federal Government has no desire to form a new bureau designed to regulate the insurance business on a national scale? This, from the standpoint of the investor, the policyholder and State revenue is a thought worthy of action. It is up to the Insurance Departments of the several States and the companies themselves, to unite their thinking so that immediate steps will be taken toward the enactment of appropriate Federal legislation relief.

If this paper has stimulated your thinking as to the importance of this decision, it has served its purpose. One further word—the public looks to the lawyers for proper guidance in matters of general public concern. I believe there will be a great opportunity for lawyers to take a leading part in the establishment of the course the insurance business is to follow during the coming years. There will be many changes and much litigation, and it becomes our duty to acquaint ourselves with the industry's problems so that we may give intelligent advice when and where needed.

An International Policy for Peace

By Joseph W. Henderson

President American Bar Association

Philadelphia, Pennsylvania

AT a time of national crisis like the present, when all of our national resources and particularly our heroic young men are dedicated to winning the war, it is unthinkable that we as lawyers should stand aside from the national effort, and none of us desire to be mere onlookers at the scene. Many of us have sons or brothers or relatives actively engaged on far-off battlefields. All of us have an immediate part to play on the home-front. We as a profession have a very particular responsibility, for the country expects us to furnish leadership of the public opinion which will place us once more on the high road toward peace and security.

Winning the war is not merely a matter of overcoming our enemies. Their defeat is our immediate purpose, but we are consecrated to that end in order that we may accomplish certain large objectives. I make no apology for asking you to consider those objectives for a moment. Unless they are clear in our minds, unless they stand at the forefront of our thinking, we are not likely to keep the unity which will enable us to win the war. And it is always possible for a nation which is victorious in a war to lose the peace which follows it.

The prime problem which is in the minds of people I see over the country is how to prevent a third World War. In a single generation, we have seen most of the peoples of the world engaged for a second time in a horrible and a destructive conflict. Unless escape can be found from these recurrent struggles, all of our constructive effort will remain in a precarious condition, we shall not have security as a nation, and from the maintenance of costly armaments we shall slide into another Armageddon on a scale which will far outstrip the present one in the sacrifices which it will demand of us.

Whether we like it or not, we live and we

shall continue to live with many other peoples in one world. Our relations with them depend not alone upon ourselves. Some seventy States existed in the world of 1939, and most of them—perhaps some new ones, also —will exist when this war is finished. No one can dictate to them how they will live together, but I refuse to believe that these States cannot work out by some cooperative means a way in which the lives of all can be at least relatively secure, relatively peaceful, and relatively harmonious.

None of us can be cock-sure as to the means to be adopted. Many different schemes may have to be tried. Some experimentation may be necessary. New ground may have to be broken. And in the process the views of many peoples must be taken into account. What does seem to be quite clear is this—that in a world where Chicago and Budapest and Bombay are but a few hours apart, we cannot be content with old methods and old forms if we are to attain security for ourselves.

We lawyers naturally think of law as the key to order. Over a period of three hundred years, our system of international law has had a continuous development. It lived out the Thirty Years War, it came through the Napoleonic wars, it was not destroyed by the World War of 1914, and I think we can say quite categorically that it will survive this war. In recent times, international law has been greatly extended. For almost a century a process of international legislation through great multipartite treaties has been under way. We have made great strides in building a law concerning the settlement of international disputes—paradoxically some of those strides were made in the recent interim between two world wars. We have even succeeded in a limited way in building some successful international institutions. So that one may say that over a period of a hundred years, we have made great progress in international law.

Yet, faced with the problems of the modern world, we have to admit that our system of international law has remained lamentably weak. It has not brought security, and it has not kept the peace. It is weak, chiefly I think, because the organization of our community of States has not proceeded apace with other developments. What vitality would there be in our national law if we had not succeeded in organizing our national community? If I am right in assigning this as the chief reason for the weakness of international law, then new hope may open for us in consequence of the recognition of the necessity for a general international organization, as it was put in the Moscow Declaration of October 30, and in the resolution adopted by our Senate a few days later.

The problem remains, however, as to the lines to be taken in forming a general international organization. I think we must realize first of all, that in times gone by men as honest, as farseeing, and as intelligent as ourselves have struggled with this problem. We may not like some of the lines which they have sought to follow. Yet I think we cannot ignore the history of international organization during the past seventy-five years. We must endeavor to profit both from the failures and from the successes of the past. No bright boy is going to think over-night the solution of our problems. No crack-pot scheme is going to work. What is required is the best thinking we can give to it—honest, fearless, constructive thinking—and I believe no part of our citizenry is better equipped for the task than the legal profession.

It is in this order of ideas that the American Bar Association has taken a great step forward in placing before all of its members a statement concerning the International Law of the future. That statement was hammered out in repeated conferences held all over the United States and Canada over a period of two years. Some two hundred men actively interested in international law participated in those conferences—judges, lawyers, professors of international law, and officials of national and international experience. They had the benefit of a vast research, much of which was conducted at the Harvard Law School. I have no hesitancy in saying that the resulting statement is the most significant contribution which has been made to the subject by any unofficial group in this or in any other country.

The principal point of that great project is based upon the setting up of an international organization, and the establishing the rule of law, justice and administered adjudication throughout the post-war world,because unless the peace of the future is to have sound legal foundations it is not likely to be enduring. It reveals the *basic belief that the overthrowing of arbitrary power and the establishing of the rule of law have a basic relationship* to the maintenance of free government and human

rights based on law rather than discretion in the government and the life of each nation. That we should have international justice according to law is all a part of the same contest which we are waging on all fronts so that the world may enjoy the orderly processes of adjudication and the law-governed enforcement of human rights. The struggle of law and adjudication and the substance of rights, in the internal affairs of the nations will not be long won or securely held if the effort for law and justice among nations is suffered to fail.

It is not offered as a last word. We are not attempting to tell anyone what to think. We are trying merely to facilitate the dicussions and to place before the public the history and experience. On a matter of this kind, experts won't have the last word, but they should have some word. And I would like to think that many thousands of members of the legal profession will be stimulated by the materials before it to consider the questions raised, to discuss them wherever brethern of the bar meet together, and to reach their own conclusions in such a way as to guide our national policy.

If I place emphasis on this whole matter, I do so because I feel that our profession has a great opportunity and a great responsibility. I offer no blueprint of my own. But I insist that on the outcome of this issue depends our really winning the war. We may not succeed in shaping the world so that our sons and grandsons will not be called upon to sacrifice their lives in a world war a generation hence. We can make a determined effort to bring about that result. If we will do so, I am rash enough to believe that a race which is making such remarkable gains in so many other fields may not be wholly incompetent to grapple with the problem of building a human society in which men can live together in security and in peace.

The alternative of law is anarchy. If the world is led by suffering to abandon anarchy in international affairs and to choose law instead, I believe our legal profession will want to help implement that choice. We now have a great opportunity. We have a serious responsibility. We have a vision of justice among nations according to law.

A great French philosopher once said, "Justice without force is impotent, force without justice is tyranny, justice with force is the hope of mankind."

We have in our grasp that hope for a future world which will be a better place to live in; and the toilers of all nations, whether by hand or brain, are looking to the legal profession to lead them and to gain perpetually for them the realization of that hope.

In Memorium

Memorial to the Members of the International Association of Insurance Counsel Who Died During the Association Year 1943 to 1944

KENNETH B. COPE, *Chairman*, Canton, Ohio

This body in its deliberations now pauses in tribute to the memory of those of its members who have died during the current Association year.

Today we honor their memory, not only as outstanding lawyers and as valued members of this Association, but also as friends, and for the invaluable service and great contribution which each has made to the betterment of all of those who knew them. These men represented the best traditions and best ideals of our profession, and it is altogether fitting that a memorial to their memory be submitted to this Annual Convention, and that the members of The International Association of Insurance Counsel, in convention assembled, record the loss sustained in their passing.

Words are wholly inadequate, as Sir Thomas Browne says: "There is no antidote against the opium of time which temporally considereth all things; our fathers find their graves in our short memories, and sadly tell us how we may be buried in our survivors."

The secretary has furnished to me the following names of members of our Association who have passed on since our last annual meeting:

A. Pratt Adams, 15 Drayton Street, Savannah, Georgia.

Edward J. Boleman, 1510 Merchants Bank Bldg., Indianapolis, Indiana.

William Bours Bond, Atlantic National Bank Bldg., Jasksonville, Florida.

John R. Browne, Glass Block, Marion, Indiana.

James R. Claiborne, 418 Olive St., St. Louis, Missouri.

William H. Clark, Jr., 1214 Republic Bank Bldg., Dallas, Texas.

Kerr Craige, 119 Lawyers Row, Salisbury, North Carolina.

J. C. Gleysteen, 611 Trimble Block, Sioux City, Iowa.

J. M. Grimm, 1115-1120 Merchants National Bank Bldg., Cedar Rapids, Iowa.

Arthur T. Keefe, Dewart Bldg., New London, Connecticut.

A. D. Kirk, 221 St. Ann Street, Owensboro, Kentucky.

H. E. Marker, Huff Bldg., Greensboro, Pennsylvania.

Chester F. Morrow, Baltimore Life Bldg., Baltimore, Maryland.

Hubert C. Pontius, First National Bank Bldg., Canton, Ohio.

Ralph F. Potter, The Rookery, Chicago, Illinois.

William L. Reed, Security Bldg., Miama, Florida.

R. W. Rodgers, Jr., Hart Building, Texarkana, Arkansas.

George B. Rose, Box 1190, Little Rock, Arkansas.

James W. Sullivan, 23 Central Avenue, Lynn, Massachusetts.

Sylvanus M. Thomas, 191 Glen Street, Glens Falls, New York.

Harold C. Thurman, 2713 First National Bldg., Oklahoma City, Oklahoma.

C. M. Vrooman, 1401 Midland Bldg., Cleveland, Ohio.

Sydney Wood, McLeod Bldg., Edmonton, Alberta, Canada.

If there are any other names which should be added to this list please notify the secretary promptly.

In acknowledgement of the loss sustained in the passing of these members of our Association, whose names I have just read, may I ask you all to rise and stand silent in tribute to their memory.

New Members

Since publication of the July 1944 issue of *Insurance Counsel Journal*, the following have been elected to membership:

A

AHLERS, PAUL F.—Des Moines, Iowa
Stipp, Perry, Bannister, Carpenter & Ahlers
1020 Bankers Trust Building

ANDERSON, DORMAN C.—Chicago 5, Ill.
Continental Casualty Company
910 South Michigan Avenue

ANDERSON, JAMES E.—Columbus 15, Ohio
Knepper, White & Dempsey
Five East Long Street

ASHBY, CLARENCE G.—Jacksonville, Fla.
Adair, Kent, Ashby & McNatt
1503 Barnett Bank Building

B

BARFIELD, CHARLES V.—San Francisco 4, Calif.
111 Sutter Street

BARRY, EDWARD, JR.—Bloomington, Ill.
404 Unity Building

BUCHANAN, G. CAMERON—Detroit 26, Mich.
Alexander, McCaslin, Cholette & Buchanan
2217 National Bank Building

BURNS, STANLEY M.—Dover, N. H.
Hughes & Burns
Strafford Bank Building

C

CUNNINGHAM, FRED D.—Baltimore, Md.
First National Bank Building

D

DOUCHER, THOMAS A.—Columbus Ohio
Wiles & Doucher
Huntington National Bank Building

DREWRY, W. SHEPHERD—Philadelphia 3, Pa.
1617 Pennsylvania Blvd.

E

ELDREDGE, RALPH R.—Marquette, Mich.
Eldredge & Eldredge
302 Kaufman Building

F

FEINOUR, JOHN C.—Harrisburg, Pa.
325 South 18th Street

FRENCH, GLENDON E.—Chicago, Ill.
Liberty Mutual Insurance Company
20 N. Wacker Drive

FROBASE, ROY H.—St. Louis, Mo.
1400 Pierce Building

G

GARVEY, GEORGE A.—New York, N. Y.
99 John Street

H

HAMILTON, JOHN S., JR.—New York 17, N. Y.
Brown, Carlson & Kiefer
60 E. 42nd Street

HARRISON, HUGH—Hartford, Conn.
700 Main Street

HOWELL, CHARLES COOK, JR.—Jacksonville 2, Fla.
Howell, McCarthy, Lane & Howell
601 Atlantic National Bank Building

HULEN, MRS. ELIZABETH—Jackson 105, Miss.
Watkins & Eager
Standard Life Building

K

KING, JOHN C.—Chicago 5, Ill.
Continental Casualty Company
910 South Michigan Avenue

KLOHR, PHILIP C.—Chicago 3, Ill.
Klohr & Merrick
105 South LaSalle Street

L

LANGDALE, HARLEY—Valdosta, Ga.
Langdale, Smith & Tillman
106 W. Hill Avenue

*LEAHY, JOHN S., JR.—St. Louis, Mo.
Leahy & Leahy
418 Olive Street

LEPINE, ABRAHAM—Chicago 5, Ill.
Continental Casualty Company
910 South Michigan Avenue

LOCKE, L. J.—Chicago 5, Ill.
Continental Casualty Company
910 South Michigan Avenue

M

MASON, WILLIAM CLARKE—Philadelphia, Pa.
Morgan, Lewis & Bockies
Fidelity Building

MERRICK, HUBERT C.—Chicago 3, Ill.
Klohr & Merrick
105 South LaSalle Street

MILLER, JOHN L.—Pittsburgh, Pa.
Duff, Scott & Smith
2615 Grant Building

MONTAGUE, J. E.—Duluth, Minn.
Abbott, MacPherran, Dancer & Montague
1000 Alworth Building

R

REED, PETER—Cleveland, Ohio
McKeehon, Merrick, Aiter & Stewart
2800 Terminal Tower

REYNOLDS, FRANCIS V.—Providence, R. I.
315 Turks Head Building

RIEPE, CARL C.—Burlington, Iowa
Hirsch, Riepe & Wright
510 Tama Building

ROCHE, DONALD M.—Chicago 5, Ill.
Continental Casualty Company
175 West Jackson Boulevard

RUTHERFORD, W. HOWELL—Chicago, Ill.
Hartford Accident & Indemnity Company
175 West Jackson Boulevard

S

ST. CLAIR, ASHLEY—Boston 17, Mass.
Liberty Mutual Insurance Company
175 Berkeley Street

STRATTON, HUBERT C.—Syracuse, N. Y.
Bond, Schoeneck & King
1400 State Tower Building

SWISHER, WARREN C.—Chicago 5, Ill.
Continental Casualty Company
910 South Michigan Avenue

W

WAGNER, RICHARD C.—New York 7, N. Y.
60 John Street

Members in Attendance 1944 Convention

Ahlers, Paul F., Des Moines, Iowa.
Albert, Milton A., Baltimore, Md.
Alexander, E. Dean, Detroit, Mich.
Anderson, J. A., Shelby, Ohio.
Andrews, John D., Hamilton, Ohio.
Baier, Milton L., Buffalo, N. Y.
Baker, Harold G., East St. Louis, Ill.
Barber, A. L., Little Rock, Ark.
Barnard, Herbert E., St. Louis, Mo.
Bartlett, Thomas N., Baltimore, Md.
Barton, John L., Omaha, Neb.
Bauder, Reginald I., Los Angeles, Calif.
Baylor, F. B., Lincoln, Neb.
Beard, Leslie P., New Orleans, La.
Beck, N. L., Chicago, Ill.
Beechwood, George E. Philadelphia, Pa.
Benoy, Wilbur E., Columbus, Ohio.
Benson, Palmer, St. Paul Minn.
Berry, J. F., Hartford, Conn.
Betts, Forrest A., Los Angeles, Calif.
Bickford, Arthur F., Boston, Mass.
Bisselle, Morgan F., Utica, N. Y.
Blanchet, Arthur, New York, N. Y.
Bloom, Herbert L., Chicago, Ill.
Brosmith, Allan E., Hartford, Conn.
Brown, Garfield W., Chicago, Ill.
Brown, Howard D., Detroit, Mich.
Brown, O. J., Syracuse, N. Y.
Brundidge, O. D., Dallas, Texas
Buchanan, G. C., Detroit, Mich.
Bunge, George C., Chicago, Ill.
Burns, George, Rochester, N. Y.
Campbell, William T., Philadelphia, Pa.
Carey, L. J., Detroit, Mich.
Cathcart, E. Kemp, Baltimore, Md.
Caverly, R. N., New York, N. Y.
Chaney, Paul P., Falls City, Neb.
Christovich, Alvin R., New Orleans, La.
Clarke, William F., Baltimore, Md.
Cobourn, Frank M., Toledo, Ohio.
Coen, Thomas M., Chicago, Ill.
Cole, Charles J., Toledo, Ohio.
Coleman, F. B., Bloomington, Ill.
Combs, Hugh D., Baltimore, Md.
Conway, James D., Hastings, Neb.
Cooper, George J., Detroit, Mich.
Cope, K. B., Canton, Ohio
Crawford, Milo H., Detroit, Mich
Crosby, G. R., New York, N. Y.
Cull, Frank X., Cleveland, Ohio.
Cunningham, F. D., Baltimore, Md.
Curran, Ray W., Kansas City, Mo.
Dalm, J. A. Kalamazoo, Mich.
Davidson, Carl F., Detroit, Mich.
Denmead, Garner W., Baltimore, Md.
Dent, R. L., Vicksburg, Miss.
Devoe, R. W., Lincoln, Neb.
Dickie, J. Roy, Pittbsurgh, Pa.
Diehm, Ellis R., Cleveland, Ohio.
Dodd, Lester P., Detroit, Mich.
Dodson, T. DeWitt, New York, N. Y.
Doucher, Thomas A., Columbus, Ohio.
Dougherty, Glenn, Milwaukee, Wis.
Drewry, W. Shepherd, Philadelphia, Pa.
Dunn, Evans, Birmingham, Ala.
Durham, F. H., Minneapolis, Minn.
Eager, P. H., Jr., Jackson, Miss.
Evans, Williams W., Paterson, N. J.
Farabaugh, G. A., South Bend, Ind.
Faude, John P., Hartford, Conn.
Fiedler, George, Chicago, Ill.
Field, Elias, Boston Mass.
Fields, Ernest W., New York, N. Y.
Finnegan, Thomas, New York, N. Y.
Folts, Aubrey F., Chattanooga, Tenn.
Ford, Byron E., Columbus, Ohio.
Foster, John E., Columbus, Ohio.
Frazer, James, Atlanta, Ga.
Freeman, W. H., Minneapolis, Minn.
French, G. E., Chicago, Ill.
Gambrell, E. Smythe, Atlanta, Ga.
Gilette, Lewis R., Minneapolis, Minn.
Gooch, John A., Fort Worth, Texas.
Gorton, Victor C., Chicago. Ill.
Grelle, R. C., Madison, Wis.
Gresham, Newton, Houston, Texas.
Grooms, Hobart, Birmingham, Ala.
Grubb, Kenneth P., Milwaukee, Wis.
Hammond, J. T., Benton Harbor, Mich.
Harbison, Hugh, Hartford, Conn.

Harvey, T. P., Hartford, Conn.
Hawkins, Kenneth B., Chicago, Ill.
Hayes, G. P., Milwaukee, Wis.
Haymond, Frank C., Fairmont, W. Va.
Heft, Carroll R., Racine, Wis.
Henderson, Joseph W., Philadelphia, Pa.
Heneghan, George E., St. Louis, Mo.
Henry, E. A. Little Rock, Ark.
Heyl, Clarence W., Peoria, Ill.
Hinshaw, Joseph H., Chicago, Ill.
Hobson, R. P., Louisville, Ky.
Hocker, L. O., St. Louis, Mo.
Hodges, Earl S., Springfield, Ill.
Holland, R. B., Dallas, Texas.
Holt, Francis M., Jacksonville, Fla.
Horn, C. M., Cleveland, Ohio.
Howell, Charles C., Jr., Jacksonville, Fla.
Hughes, John H., Syracuse, N. Y.
Hulen, Mrs. Elizabeth, Jackson, Miss.
Jainsen, W. C., Hartford, Conn.
Johnson, F. C., Jr., New Orleans, La.
Johnson, Lowell R., Kansas City, Mo.
Kadyk, David J., Chicago, Ill.
Kelley, Thomas D., Kansas City, Mo.
Kemper, W. L., Houston, Texas.
Klohr, Philip, Chicago, Ill.
Kluwin, John A., Milwaukee, Wis.
Knight, William D., Rockford, Ill.
Knowles, William F., Kansas City, Mo.
Knudson, Bennett O., Albert Lea, Minn.
Kottgen, Hector, New York, N. Y.
Kramer, D., Binghamton, N. Y.
Kristeller, Lionel P., Newark, N. J.
LaBrum, J. Harry, Philadelphia, Pa.
Laymon, Paul E., Detroit, Mich.
Leftwich, C. W., Columbus, Ohio.
Levin, Samuel, Chicago, Ill.
Lewis, R. K., Palm Beach, Fla.
Lloyd, L. Duncan, Chicago, Ill.
Lloyd, Frank T., Jr., Camden, N. J.
Locke, L. J., Chicago, Ill.
Lucas, Wilder, St. Louis, Mo.
Luce, Robert T., Chicago, Ill.
Manier, W. R., Jr., Nashville, Tenn.
Marble, Harry E., Cincinnati, Ohio.
Marryott, F. J., Boston, Mass.
Martin, William F., New York, N. Y.
Mayne, Walter R., St. Louis, Mo.
Merrell, Clarence F., Indianapolis, Ind.
Merrick, H. C., Chicago, Ill.
Meyers, Allen, Topeka, Kan.
Miller, Oliver H., Des Moines, Iowa.
Montgomery, Richard B., Jr., New Orleans, La.
Moore, B. Allston, Charleston, S. C.
Morris, Stanley C., Charleston, W. Va.
Morse, Rupert G., Kansas City, Mo.
Moser, Henry S., Chicago, Ill.
Moser, W. E., St. Louis, Mo.
Muse, Leonard G., Roanoke, Va.
McAlister, David I., Washington, Pa.
McClendon, William H., Jr., New Orleans, La.
McDonald, W. Percy, Memphis, Tenn.
McGough, Paul J. ,Minneapolis, Minn.
McKenna, James J., Chicago, Ill.
McNamara, William F., Chicago, Ill.
Nelson, R. M., Memphis, Tenn.
Nichols, Henry W., New York, N. Y.
Noll, R. M., Marietta, Ohio.
Nordmark, Godfrey, Denver, Colo.
Nugent, James E., Kansas City, Miss.
O'Herin, William, St. Louis, Mo.
Olds, James, Akron, Ohio.
Oliver, Allen L., Cape Girardeau, Mo.
Orlando, Samuel P., Camden, N. J.
Osborne, H. P., Jacksonville, Fla.
O'Sullivan, J. Francis, Kansas City, Mo.
Owens, G., Little Rock, Ark.
Parker, Leo B., Kansas City, Mo.
Parnell, A. W., Appleton, Wis.
Patterson, J. B., Wichita, Kan.
Peterson, John R., Chicago, Ill.
Pierson, Welcome D., Oklahoma City, Okla.
Poore, H. T., Knoxville, Tenn.
Popper, Joseph W., Macon, Ga.
Powell, A. G., Atlanta, Ga.
Price, Paul E., Chicago, Ill.
Putnam, C. C., Des Moines, Iowa.
Quinn, Henry I., Washington, D. C.
Racine, Charles W., Toledo, Ohio.
Randall, John D., Cedar Rapids, Iowa.
Reed, Peter, Cleveland, Ohio.
Reeder, P. E., Kansas City, Mo.
Reeves, G. L., Tampa, Fla.
Reynolds, Hugh E., Indianapolis, Ind.
Rich, Ernest A., Minneapolis, Minn.
Riepe, Carl C., Burlington, Iowa.
Rodgers, Harry E., Grand Rapids, Mich.
Rogoski, Alexis J., Muskegon, Mich.
Roseberry, C. D., Lamars, Iowa.
Rowe, Royce, Chicago, Ill.
Rutherford, Harold, Chicago, Ill.
Ryan, L. C., Syracuse, N. Y.
St. Clair, Ashley, Boston, Mass.
Schlotthauer, George, Madison, Wis.
Schneider, Philip J., Cincinnati. Ohio.
Schwartz, Wilbur C., St. Louis, Mo.
Scroggie, L. J., Detroit, Mich.
Sexton, John J., St. Paul. Minn.
Shackleford, R. W., Tampa, Fla.
Shannon, George T., Tampa, Fla.
Shull, D. P., Sioux City, Iowa.
Skeen, John H., Baltimore, Md.

Slaton, J. M., Atlanta, Ga.
Smith, Chase M., Chicago, Ill.
Smith, H. L., Tulsa, Okla.
Smith, Willis, Raleigh, N. C.
Smithson, Spurgeon L., Kansas City, Mo.
Snow, Charles B., Jackson, Miss.
Spray, Joseph A., Los Angeles, Calif.
Sprinkle, Paul C., Kansas City, Mo.
Stecher, Joseph D., Toledo, Ohio.
Stewart, Joseph R., Kansas City, Mo.
Stichter, Wayne, Toledo, Ohio.
Stratton, H. C., Syracuse, N. Y.
Sutherland, R. J., Madison, Wis.
Swanstrom, Gerald M., Milwaukee, Wis.
Sweet, William P., Kansas City, Mo.
Sweitzer, J. M., Wausau, Wis.
Swisher, W. C., Chicago, Ill.
Ten Eyck, B., New York, N. Y.
Thompson, Floyd E., Chicago, Ill.
Thornbury, P. L., Columbus, Ohio.
Topping, P. H., New York, N. Y.
Touchstone, Lucien, Dallas, Texas.
Touchstone, O. O., Dallas, Texas.
Townsend, Mark, Jersey City, N. J.
Van Dyke, J. W., Paris, Tenn.
Van Orman, Francis, Newark, N. J.
Wagner, Richard C., New York, N. Y.
Warner, C. F., Kansas City, Mo.
Warren, F. G., Sioux Falls, S. D.
Wassell, T. W., Dallas, Texas.
Webb, Robert L., Topeka, Kan.
Weichelt, George M., Chicago, Ill.
Weiss, S. Paul, New Orleans, La.
Wesley, G. B., New York, N. Y.
White, Lowell, Denver, Colo.
White, Morris E., Tampa, Fla.
Wicker, John J., Richmond, Va.
Wiles, Arthur W., Columbus, Ohio.
Wiley, John F., Washington, Pa.
Woodard, E. C., Chicago, Ill.
Yancey, George W., Birmingham, Ala.
Zurett, Melvin H., Rochester, N. Y.

Guests Attending 1944 Convention

Abramson, Marcus, New York, N. Y.
Baier, Mrs. Milton L., Buffalo, N. Y.
Baker, Mrs. Harold G., East St. Louis, Ill.
Bauder, Mrs. Reginald I., Los Angeles, Calif.
Benoy, Mrs. Wilbur E., Columbus, Ohio.
Berry, Mrs. J. F., Hartford, Conn.
Brown, Mrs. O. J., Syracuse, N. Y.
Burns, Mrs. George, Rochester, N. Y.
Butler, A. Prentiss, New York, N. Y.
Campbell, Mrs. William T., Philadelphia, Pa.
Carey, Mrs. L. J., Detroit, Mich.
Caverly, Mrs. R. N., New York, N. Y.
Chambers, Reed M., New York, N. Y.
Chaney, Mrs. Paul P., Falls City, Neb.
Christovich, Mrs. Alvin R., New Orleans, La.
Cobourn, Mrs. Frank M., Toledo, Ohio.
Cole, Mrs. Charles J., Toledo, Ohio.
Coleman, Mrs. F. B., Bloomington, Ill.
Conway, Mrs. James D., Hastings, Neb.
Cope, Mrs. K. B., Canton, Ohio.
Crawford, Mrs. Milo H., Detroit, Mich.
Crosley, H. E., Chicago, Ill.
Culbertson, James G., Chicago, Ill.
Cull, Mrs. Frank X., Cleveland, Ohio.
Davies, F. W., Birmingham, Ala.
Davies, Mrs. F. W., Birmingham, Ala.
Deak, William S., Reading, Pa.
Deak, Mrs. William S., Reading, Pa.
Denmead, Mrs. Garner W., Baltimore, Md.
Dent, Mrs. R. L., Vicksburg, Miss.
Dickie, Mrs. J. Roy, Pittsburgh, Pa.
Dodd, Mrs. Lester P., Detroit, Mich.
Doucher, Mrs. Thomas, Columbus, Ohio.
Dougherty, Mrs. Glenn, Milwaukee, Wis.
Drinkwater, Terrell C., Denver, Colo.
Eager, Mrs. Pat H., Jr., Jackson, Miss.
Elliott, Daniel W., Chicago, Ill.
Farley, S. E., Milwaukee, Wis.
Farley, Mrs. S. E., Milwaukee, Wis.
Faust, Carl, Chicago, Ill.
Faust, Mrs. Carl, Chicago, Ill.
Folts, Doug, Chattanooga, Tenn.
Ford, Mrs. Byron E., Columbus, Ohio.
Ford, Byron E., Jr., Columbus, Ohio.
Fraizer, C. C., Lincoln, Neb.
Fraizer, Mrs. C. C., Lincoln, Neb.
Fraizer, Lt. Ted., Lincoln, Neb.
Frazer, Mrs. James, Atlanta, Ga.
Freeman, Mrs. W. H., Minneapolis, Minn.
Gillette, Mrs. Lewis R., Minneapolis, Minn.
Gooch, Mrs. John A., Fort Worth, Texas.
Gordon, William, Indianapolis, Ind.
Gorton, Mrs. Victor C., Chicago, Ill.
Green, Robert T., Shelby, Ohio.
Grelle, Mrs. R. C., Madison, Wis.
Grubb, Mrs. Kenneth P., Milwaukee, Wis.
Hale, Hamilton O., New York, N. Y.
Hayes, Mrs. G. P., Milwaukee, Wis.
Heneghan, Mrs. G. E., St. Louis, Mo.
Heneghan, George, Jr., St. Louis, Mo.
Heptig, Mrs. Bessie, Chicago, Ill.
Hobson, Mrs. R. P., Louisville, Ky.

Holt, Mrs. Francis M., Jacksonville, Fla.
Janney, Mrs. Douglas, Evanston, Ill.
Johnson, Mrs. F. C., Jr., New Orleans, La.
Jones, Paul F., Danville, Ill.
Kemper, Mrs. W. L., Houston, Texas.
King, W. E., St. Paul, Minn.
Knight, Fred S., New York, N. Y.
Knight, Mrs. Fred S., New York, N. Y.
Knight, Mrs. William D., Rockford, Ill.
Knowles, Mrs. William F., Kansas City, Mo.
Koehler, R. J., LeMars, Iowa.
Koehler, Mrs. R. J., LeMars, Iowa.
Kottgen, Mrs. Hector, New York, N. Y.
Kuhn, Edward W., Memphis, Tenn.
Laymon, Mrs. Paul, Detroit, Mich.
Lewis, Mrs. R. K., Palm Beach, Fla.
Lloyd, L. Duncan, Chicago, Ill.
Marble, Mrs. Harry E., Cincinnati, Ohio.
Martin, Mrs. William F., New York, N. Y.
Meyers, Mrs. Allen, Topeka, Kan.
Montgomery, Mrs. Richard B., Jr., New Orleans, La.
Morris, Mrs. Stanley, Charleston, W. Va.
Muse, Mrs. Leonard G., Roanoke, Va.
McAlister, Mrs. David I., Washington, Pa.
McGough, Mrs. Paul J., Minneapolis, Minn.
McNamara, Mrs. William F., Chicago, Ill.
Nelson, Mrs. R. M., Memphis, Tenn.
Nugent, Mrs. James E., Kansas City, Mo.
O'Brien, G. A., Chicago, Ill.
Oliver, Mrs. Allen L., Cape Girardeau, Mo.
Orr, George W., New York, N. Y.
O'Sullivan, Mrs. J. Francis, Kansas City, Mo.
O'Sullivan, Miss Jo Ann, Kansas City, Mo.
O'Sullivan, J. Francis, Jr., Kansas City, Mo.
Parker, Mrs. Leo B., Kansas City, Mo.
Patterson, Mrs. J. B., Wichita, Kan.
Popper, Mrs. Joseph W., Macon, Ga.
Powell, Mrs. Arthur G., Atlanta, Ga.
Pringle, K. G., New York, N. Y.
Ray, Foster I., Chicago, Ill.
Reeder, Miss Betty Jean, Kansas City, Mo.
Rodgers, Mrs. Harry E., Grand Rapids, Mich.
Roseberry, Mrs. C. D., LeMars, Iowa
Schlotthauer, Mrs. George, Madison, Wis.
Schwartz, Mrs. Wilbur C., St. Louis, Mo.
Sexton, Mrs. John J., St. Paul, Minn.
Shackleford, Mrs. R. W., Tampa, Fla.
Slaton, Mrs. J. M., Atlanta, Ga.
Snow, Mrs. Charles B., Jackson, Miss.
Snow, Miss Dorothy, Jackson, Miss.
Sommers, Byron, Chicago, Ill.
Spray, Mrs. Joseph A., Los Angeles, Calif.
Sprinkle, Mrs. Paul C., Kansas City, Mo.
Stecher, Mrs. Joseph D., Toledo, Ohio.
Stewart, Mrs. Joseph R., Kansas City, Mo.
Stichter, Mrs. Wayne, Toledo, Ohio.
Sweet, Mrs. William P., Kansas City, Mo.
Sweitzer, Mrs. J. M., Wausau, Wis.
Topping, Mrs. P. H., New York, N. Y.
Van Dyke, Mrs. J. W., Paris, Tenn.
Van Alsburg, Donald J., Detroit, Mich.
Warner, Mrs. C. F., Kansas City, Mo.
Weeks, Grant, Chicago, Ill.
Weichelt, Miss Maude, Chicago, Ill.
White, Mrs. Lowell, Denver, Colo.
Whitelaw, Ensign M. H., Chicago, Ill.
Whitelaw, Mrs. M. H., Chicago, Ill.
Wiles, Mrs. A. W., Columbus, Ohio.
Wiley, Mrs. John F., Washington, Pa.
Wiley, Miss Joan, Washington, Pa.
Wiley, Miss Laura, Washington, Pa.
Wilkinson, John O., Chicago, Ill.
Wise, W. B., New York, N. Y.
Witzel, H. F., New York, N. Y.

End